88-183

No._____

Supreme Court, U.S.
FILED
JUL 30 1988
JOSEPH F. SPANIOL, JR.

In The
SUPREME COURT of the UNITED STATES
October Term 1988

SANTOS TORRES, ET AL.,
Petitioners,

vs.

J. F. ENTERPRISES, INC., ET AL.,
Respondents,

_____ and _____

DELTON D. OPFER,
Respondent,

vs.

LORY ARNOLD, JR.,
Petitioner.

PETITION FOR WRIT OF CERTIORARI
To The
OHIO COURT OF APPEALS
FOR THE SIXTH APPELLATE DISTRICT

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QUESTIONS PRESENTED

Does a State, through its supreme court and general assembly, act without authority and power where its rule, governing practice and procedure, sua sponte, takes away a hearing, having oral argument and the record sent up by the court below, on one of three appeals as of right to the supreme court, where its constitution grants those three appeals as of right, and where the constitution forbids the supreme court to prescribe, and the general assembly to approve, rules which "abridge, enlarge, or modify any substantive right", and where, by plain language, the constitution treats, as equal, the three appeals as of right, particularly where the abridged right involves "cases involving questions arising under the constitution of the United States"?

NOTE: 28 U.S.C. §2403(b) may be applicable.

QUESTION PRESENTED

May a State provide less procedural due process in an appeal as of right to its supreme court, granted to its citizens by the state constitution, than the United States provides in merely a discretionary right of appeal to this Supreme Court, particularly where the state decisions below were grounded in non-federal grounds which were without fair or substantial grounds?

NOTE: 28 U.S.C. §2403(b) may be applicable.

PARTIES

Case No. 1: Torres v. J.F. Enterprises,Inc.

Petitioners:

Santos Torres,

Esther Torres, plaintiffs below

Respondents:

J.F. Enterprises, Inc.,

Robert Richard-officer of corp.,

Kathy Rose, employee,

Greg Shetzer, employee,
defendants below.

Case No. 2: Opfer v. Arnold, Jr.

Petitioner:

Lory Arnold, Jr., defendant
below,

Respondent:

Delton D. Opfer, plaintiff
below.

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OPINIONS BELOW

A. Case No. 1: Santos Torres, et. al., vs. J. F. Enterprises, Inc., et al.

The decision of the Ohio Court of Appeals for the Sixth Appellate District refusing to decide the constitutional question (Case No. WD-87-55), which was rendered on March 31,1988, is unreported, and is reproduced in the appendix (A1-A18).

The decision of the Wood County, Ohio, Court of Cmmon Pleas granting summary judgment to defendants (respondents herein) (Case No. 86-CIV-255) which was rendered on July 21, 1987, is unreported, and is reproduced in the appendix (A19-A29).

The Entry of the Supreme Court of Ohio dismissing petitioners' appeal as of right sua sponte (Case No. 88-669), which was rendered on May 25, 1988, is unreported, and is reproduced in the appendix (A30-A31).

B. Case No. 2: Delton D. Opfer vs. Lory Arnold, Jr.

The decision of the Ohio Court of

Appeals for the Sixth Appellate District affirming the trial court, which was rendered on March 11, 1988 (Case No. L-87-159) is unreported, and is reproduced in the appendix (A34-A54).

The decision of the Lucas County, Ohio, Court of Common Pleas granting judgment to plaintiff (respondent herein) (Case No. 86-1918), is unreported, and is reproduced in the appendix (A55-A61).

The Entry of the Supreme Court of Ohio dismissing petitioner's appeal as of right sua sponte (Case No. 88-668) which was rendered on May 25, 1988, is unreported, and is reproduced in the appendix (A62-A63).

STATEMENT OF CLAIMED JURISDICTION

The Entry of the Supreme Court of Ohio, in both cases sub judice, was entered on May 25, 1988. Jurisdiction is alleged pursuant to 28 U.S.C. §1257(3) and the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONS, STATUTES, RULES INVOLVED

(a) Both cases sub judice involve the Fourteenth Amendment to the Constitution of the United States, in pertinent part states:

"[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(b) The Constitution of Ohio is involved, and in pertinent parts states:

Art IV, §2(A)(2):

"The supreme court shall have appellate jurisdiction as follows:

"(a) In appeals from the courts of appeals

as a matter of right in the following:

"(i)Cases originating in the courts of appeals;

"(ii)Cases in which the death penalty has been affirmed;

"(iii)Cases involving questions arising under the constitution of the United States or of this state."

Art IV, §5(B) of Constitution of Ohio:

"The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right."

Both cases sub judice also involve Rule II of Ohio's Rules of Practice for its supreme court, Sections 3 and 9, stating:

"Section 3. Consideration as to Existence of Constitutional Question

"(B) Where appellant claims that he has an appeal as of right (i.e., that the case involves a constitutional question), the Supreme Court will, sua sponte, consider the case as on a motion to dismiss the appeal as one not involving any substantial constitutional question and will consider such motion to dismiss at the same time that it considers any motion to certify or motion for leave to appeal in the case."

"Section 9. Record Not to Be Sent to Supreme Court Until Appeal Allowed

"Except in those cases originating in

> the Court of Appeals, and in those cases in which the death penalty has been affirmed, unless otherwise ordered and notwithstanding R.C. 2505.08, neither the original papers nor the transcript of proceedings shall be transmitted to the Supreme Court, unless and until a motion to certify the record has been granted or a motion for leave to appeal has been granted or, in the case of an appeal as of right, unless and until the court has overruled the motion to dismiss referred to in Section 3 of this rule."

Lastly, Rule 19 of This Court's Rules of Practice is involved in order to show a comparison of procedural due process in the state supreme court and the Supreme Court of the United States,stating in pertinent part:

> ".1. A party intending to file a petition for certiorari, prior to filing the case in this Court or at any time prior to action by this Court on the petition, may request the clerk of the court possessed of the record to certify it, or any part of it***to this Court***."

No. _____

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SANTOS TORRES, ET AL.,
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_____ and _____

DELTON D. OPFER,
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PETITION FOR WRIT OF CERTIORARI
To The
OHIO COURT OF APPEALS
FOR THE SIXTH APPELLATE DISTRICT

STATEMENT OF THE CASES

Petitioners Santos Torres and Esther Torres filed the following constitutional question in the Sixth District Court of Appeals, following a summary judgment granted to respondents by the trial court:

> "4. The trial court judge had a personal bias and prejudice against the two Hispanic plaintiffs to the extent that it prevented the trial judge from exercising his judicial functions impartially in plaintiffs' case, in direct violation of plaintiffs' Fourteenth Amendment Due Process and Equal Protection rights." (Decision, A4.)

Petitioners first learned of the trial judge's alleged "bias against Mexicans" twenty days after the trial judge granted summary judgment against them. Under Ohio Rules of Court, "a motion for a new trial shall be served not later than fourteen days after the entry of judgment."

The Court of Appeals refused to decide petitioners' due process question against the trial judge, citing and quoting from a decision of the Ohio Supreme Court:

> "[T]he Court of Appeals [is] without authority to ...void the judgment of the trial court upon that basis." (Decision, A7.)

Petitioners then timely presented their Fourteenth Amendment question to the Supreme Court of Ohio, in this manner:

"III. SUBSTANTIAL CONSTITUTIONAL QUESTION

"(A) The trial judge had a personal bias and prejudice against the two Hispanic plaintiffs that prevented the trial judge from exercising his judicial functions impartially, in direct violation of plaintiffs' Fourteenth Amendment Due Process and Equal Protection rights." (Emphasis in original.)

In its Entry, dated May 25, 1988, the Supreme Court of Ohio treated petitioners' appeal,as of right to that court,in this way:

> "Upon consideration of the motion for an order directing the Court of Appeals for Wood County to certify its record, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein." (Entry, A30.)

No Ohio court had decided petitioners' constitutional question, arising under the constitution of the United States, despite Ohio citizens' substantive right to appeal, as of right, to their supreme court from the court of appeals, granted to them by the Constitution of Ohio, Art.IV §2(B)(2)(a)(iii). Petitioners Santos Torres and

Esther Torres appealed to this Court May 31, 1988, challenging Ohio's Rule II.

In the second case sub judice, petitioner Lory Arnold, Jr., had an identical experience with Ohio's Rule II and its prejudicial effect upon his appeal as of right to the Supreme Court of Ohio from the same Court of Appeals.

Following a bench trial in which his attorney made objection, defendant Arnold had his attorney file the following constitutional question to said Court of Appeals:

> "Second Assignment Of Error: A state official, the trial court judge, had a personal bias or prejudice for plaintiff to the extent it prevented him from exercising his judicial functions impartially in defendant's case, in direct violation of defendant's Fourteenth Amendment Due Process rights." (Emphasis in original, see Decision of Court of Appeals, A42.)

Defendant (petitioner herein) Arnold's attorney pointed out three specific parts of the bench trial in which the trial judge displayed a prejudicial "adversarial role"

that favored the plaintiff in the case: (1) trial judge did not allow defendant Arnold to explain his answer upon request of defendant, (2) trial judge attempted to intimidate defendant by asking irrelevant questions about defendant's wife who was neither a party nor a witness to the proceeding, and (3) trial judge did not acknowledge or rule on defendant's objection to plaintiff's counsel asking more than one question within one question, yet the trial judge continually sustained plaintiff's same objections against defendant's counsel. The Court addressed not one.

Instead, the Court of Appeals "not[ed]" *** the trial judge did intervene during the questioning of certain witnesses [but] is neither prejudicial or biased behavior***."

Petitioner Arnold then timely presented his Fourteenth Amendment question to the Supreme Court of Ohio, in this manner:

"III. SUBSTANTIAL CONSTITUTIONAL QUESTION
"A. In Trial Court:
"Judge Charles Abood, during a bench

trial, violated defendant's Fourteenth Amendment Due Process rights to a fair and impartial hearing." (Emphasis in original.)

In its Entry, dated May 25, 1988, the Supreme Court of Ohio treated petitioner's appeal, as of right to that court from the court of appeals, in this way:

"Upon consideration of the motion for an order directing the Court of Appeals for Lucas County to certify its record, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein." (Entry, A62.)

Petitioner Lory Arnold, Jr., appealed to this Court May 31, 1988, challenging Ohio Rule II on constitutional grounds.

SUMMARY OF REASONS FOR GRANTING WRIT

The importance of these cases goes far beyond the parties themselves. Ohio's Rule II, Sections 3 and 9, appears to abridge a substantive right given to Ohio citizens by the Ohio Constitution itself, i.e., the appeal as of right from the court of appeals

to the Supreme Court of Ohio in "cases involving questions arising under the constitution of the United States", Art.IV §2(B)(2)(a)(iii). The other two appeals as of right, granted by the state constitution, are not affected or abridged at all by Rule II, as seen from the language of the Rule itself.

Further, Ohio's Rule II provides less procedural due process than Rule 19 of this Court, even though Rule II affects an appeal as of right, whereas Rule 19 affects discretionary appeals. A uniform and just system of federal law and federal review appears to require this Court's intervention.

Lastly, time will not further illuminate or diminish the constitutional issues in dispute, as Sections 3 and 9 of Rule II have been a part of established state practice since 1979.

ARGUMENT

RULE II ABRIDGES SUBSTANTIVE RIGHT

The state action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation and its judicial interpretation, Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949).

In the first case sub judice, petitioners Santos Torres and Esther Torres never had their Fourteenth Amendment due prosess question decided by any Ohio court, yet the Constitution of Ohio grants all of its citzens, of whom Santos and Esther are two, an appeal as of right from the court of appeals to the supreme court, Art. IV §2(B)(2)(a), and grants two other equal appeals as of right:

> "(2) The supreme court shall have appellate jurisdiction as follows:
> "(a) In appeals from the court of appeals as a matter of right in the following:
> "(i) Cases originating in the court of appeals;
> "(ii) Cases in which the death penalty has been affirmed;
> "(iii) Cases involving questions arising under the constitution of the United States or of this state."

At the same time, the state constitution limits the rule-making authority and power of the supreme court to prescribe, and the general assembly to approve, rules governing practice and procedure:

> "IV §5(B) The supreme court shall prescribe rules governing practice and procedure in all courts of this state, which rules shall not abridge, enlarge, or modify any substantive right. ***
>
> "Proposed rules shall be filed by the court...with the clerk of each house of the general assembly [and] shall take effect...unless prior to such day the general assembly adopts a concurrent resolution of disapproval."

Notwithstanding Art. IV §5(B), the supreme court prescribed, and the general assembly did not disapprove, Rule II of its practice and procedure which states in Section 3 and Section 9:

> "Section 3. Consideration as to Existtence of Constitutional Question
>
> "(B) Where appellant claims that he has an appeal as of right (i.e.,that the case involves a constitutional question), the Supreme Court will, sua sponte, consider the case as on a motion to dismiss the appeal as one not involving any substantial constitutional question and will consider such motion to dismiss at the same time

that it considers any motion to certify or motion for leave to appeal in the case." (Parentheses in original.)

"Section 9. Record Not to Be Sent to Supreme Court Until Appeal Allowed

"Except in those cases originating in the Court of Appeals, and in those cases in which the death penalty has been affirmed, unless otherwise ordered and notwithstanding R.C.2505.08, neither the original papers nor the transcript of proceedings shall be transmitted to the Supreme Court, unless and until a motion to certify has been granted or a motion for leave to appeal has been granted or, in the case of an appeal as of right, unless and until the court has overruled the motion to dismiss referred to in Section 3 of this rule.

"(Amended, eff 3-1-79)".

When Santos and Esther Torres, in the first case, and Lory Arnold, Jr., in the second case, attempted to timely exercise their appeals as of right from the court of appeals to the supreme court, the Supreme Court of Ohio, in separate Entries dated May 25, 1988, and pursuant to Rule II, gave both sets of petitioners only a "consideration" hearing to determine whether or not a "substantial constitutional question"

existed, and,sua sponte, treated their appeal as of right as upon a motion to dismiss, without giving either set of petitioners a hearing equivalent to the hearing the supreme court gives to the other appeals as of right, i.e, no hearing on the merits with oral argument and no record sent up by the court below before the "determination" hearing, prohibited by the rule.

Petitioners Santos and Esther Torres, and petitioner Lory Arnold, Jr., challenge Section 3 ("consideration" hearing sua sponte) and Section 9 ("Record Not to Be Sent To Supreme Court Until Appeal Allowed) as unconsitutionally abridging their substantive right granted to them under the Constitution of Ohio, i.e., the right of an appeal as of right from the court of appeals to the supreme court in "[c]ases involving questions arising under the constitution of the United States."

Petitioners do not believe that the plain language of their state constitution

permits anything but equal treatment by the State of Ohio on all three appeals as of right, i.e., the same type of hearing in all three types of appeal as of right.

Where, in the Ohio Constitution, do its framers or amenders intimate, let alone state, that an appeal as of right, on "questions arising under the constitution of the United States", should be treated with less procedural due process than an appeal as of right in "[c]ases originating in the court of appeals"?

Where, in the Ohio Constitution, do its framers or amenders state, or even intimate, that an appeal as of right in "[c]ases involving questions arising under the constitution of the United States" should be treated with less procedural due process than "[c]ases in which the death penalty has been affirmed"?

Where, petitioners ask, does the state supreme court and general assembly find

the authority and power to whittle down their citizens' appeal as of right on "questions arising under the constitution of the United States" to a much smaller class of questions which they, under Rule II, now call "substantial constitutional question[s]" arising under the constitution of the United States?

Rule II, Sections 3 and 9, severely impinges upon Ohio citizens' appeal as of right to the supreme court in "[c]ases involving questions arising under the constitution of the United States".

RULE II, WHICH AFFECTS AN APPEAL AS OF RIGHT, PROVIDES LESS PROCEDURAL DUE PROCESS THAN RULE 19 OF THIS COURT, WHICH AFFECTS A LESS VALUABLE APPEAL, A DISCRETIONARY APPEAL

In their second federal question, petitioners in both cases, sub judice, ask:

> "May a State provide less procedural due process in an appeal as of right*** than the United States provides in merely a discretionary right of appeal [Rule 19], particularly where the state decisions below were grounded in non-federal grounds which were without

fair or substantial grounds?"

Rule II affects an appeal as of right to a state supreme court. Rule 19 of this Court affects a discretionary right of appeal to the Supreme Court of the United States. Yet the discretionary appeal to this Court permits the full record to be sent to this Court prior to its action on the discretionary appeal. Rule II does not.

Petitioners, in both cases, challenge Rule II, Sections 3 and 9, on due process grounds, in addition to unconstitutionally abridging their appeal as of right.

In both cases sub judice, the state decisions below, both, the trial court and the court of appeals in each case, show on the face of each decision that each was grounded in non-adequate state grounds.

In the Torres case, the facts, as found by the trial judge, when viewed in light of the latest applicable law cited

by the court itself, clearly show that the trial judge granted summary judgment against Santos and Esther Torres without a sufficient evidentiary basis. The trial judge found, by the defendants' (respondents herein) own testimony, not petitioners', that the hole that Santos Torres "stepped into", breaking his leg, at defendant's self-serve gas station was "1½ inches" deep and "two feet square" (Decision A23, A24), and that defendants had notice, the month before the accident, that "there existed another defect in the pavement around the northern pumps island...approximately fifteeen feet long and of unknown depth where the pavement had settled" (Decision A23).

The trial court cited seven defective-public-sidewalk-private-pavement cases for support (A24), latest of which was Cash v. Cincinnati, 66 Ohio St. 2d 319, 421 NE 2d 1275 (1981), whose syllabus stated:

"1. Reasonable minds could differ as to whether a 12 to 14 inch wide, one and one-half inch deep, excavation excavation extending into the width of a crosswalk in a heavily traveled downtown section of the city was so substantial that such defect rendered the crosswalk unsafe for travel in the usual and ordinary mode. (Kimball v. Cincinnati, 160 Ohio St. 370, distinguished.)

"In such a case when reasonable minds might differ as to whether a defect in a crosswalk is so trivial as to relieve liability, a trial court properly leaves that issue to the jury, and all the attendant circumstances must be considered in determining whether such a crosswalk is reasonably safe for use by pedestrians."

The hole in Cash, in its syllabus, that the Supreme Court ruled should be sent to the jury was "one and one-half inch deep" by "12 to 14 inch wide".

The hole that Santos Torres stepped into was the same depth, "1½ inches" deep by "two feet square" (Decision, A23, A24), slightly larger than in Cash. Yet the trial judge granted summary judgment to respondents, after citing Cash, and after Cash, in its syllabus, distinguished Kimball v. Cincinnati and its "two inch" doctrine.

And the deposition of Santos Torres showed the "attendant circumstance" of obscured vision that was present in Cash:

> "Mr. Torres on cross by [D's attorney]":
>
> "Q All right. You open the door, you go to get out, and you step down from the van, and it's as you step down, you hit this depression, and hear or you feel something break?
>
> "A I open the door, but I couldn't see nothing, because that thing is right along the edge. I couldn't see if, if there was a hole or what, because--
>
> "Q You didn't look?
>
> "A Which--
> "Q You didn't look when you stepped down?
> "A I looked, but I didn't see the edge of it, and that's what cracked me, not because I put the weight on where the hole was." (Dep., 24,25.)

Accordingly, genuine issues of fact existed and summary judgment against Santos and Esther Torres was improper.

In the second case sub judice, fewer words, from the trial court's decision, are needed to show that a substantial part of the judgment against petitioner Lory Arnold, Jr., was improper and grounded in a non-adequate, non-federal basis.

The trial court's findings of fact were left undisturbed by the court of appeals, and only two are needed to show that substantial justice was not done:

> "1. In April of 1984, the parties entered into a[50/50] partnership agreement.
>
> "4. Under the agreement, [respondent] was to pay an additional amount to obtain a 50% interest in the tools. [Respondent] did not make this payment;" (Decision, A58, A59.)

The Court of Appeals cited this section of the controlling law in Ohio, Ohio Uniform Partnership Act, §1775.17:

> "1775.17 Rules for determining rights and duties of partners
>
> "(A) Each partner shall be repaid his contribution, whether by way of capital or advances, to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; ***"
> (Decision, A49

Yet the trial judge granted judgment to respondent, but did not require respondent to make the substantial "payment" to "obtain a 50% interest in the tools" which the partnership used for approximately two

years, and without said tools, no profits would have been possible to be split and awarded to respondent in the form of a judgment. Testimony at the bench trial showed that the tools were worth several thousands of dollars, and the uncontroverted testimony of petitioner Arnold was that the "use" of the tools to the partnership was worth "$6,000.00", elicited by the trial judge himself on direct interrogation of petitioner on the stand.

Accordingly, not one of the two cases, sub judice, was grounded in adequate non-federal grounds.

CONCLUSION:

For the reasons stated above, petitioners in both cases submit that this single appeal brings before this Court constitutional questions on Rule II that are important to all Ohio citizens, and which require plenary consideration, with briefs

on the merits and oral argument, for their resolution.

Respectively submitted,

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APPENDIX

FILED
WOOD COUNTY, OHIO
COURT OF APPEALS
MAR 31 1988
Clerk
Rebecca E. Bhaer

COURT OF APPEALS OF OHIO, SIXTH DISTRICT

COUNTY OF WOOD

C. A. NO. WD-87-55

Santos Torres and Esther Torres
APPELLANTS

-VS-

J. F. Enterprises, Inc., et al.
APPELLEES

APPEAL FROM WOOD COUNTY COMMOM PLEAS COURT

NO. 86-CIV-255

DATE March 31, 1988

DECISION AND JOURNAL ENTRY

This cause is on appeal from a judgment of the Wood County Court of Common Pleas.

The events which gave rise to this action are essentially uncontroverted. On September 6, 1985, at approximately 6:00 a.m., plaintiff-appellant,

Santos Torres, drove his van to a gas station owned by defendant-appellee J. F. Enterprises, Inc. Santos Torres was accompanied by his wife Esther Torres who joins him in this appeal.

Upon arriving at the gas station, appellants parked their van near the northwest set of gasoline pumps. As he was exiting his van, Mr. Torres stepped onto what has been described in varying ways by the parties as an "elongated hole," a "crack" and a "depression." Appellant's right foot stepped on the edge of this depressed area as he decended from his van. In exiting the van, appellant fell, injuring his right foot and knee. Appellant Esther Torres witnessed the incident and reported it to defendant-appellees Greg Shetzer and Kathy Rose, employees working at the station. Appellees Shetzer and Rose were approximately forty feet away from the

van and did not observe appellant's fall.

In their original cause of action, appellants alleged that appellee J. F. Enterprises, Inc., negligently maintained the area around the gas pumps so as to cause injury to the appellant.

On June 8, 1987, appellee J. F. Enterprises, Inc., moved for summary judgment as to any issue regarding negligence. In support of the motion for summary judgment appellee alleged that because appellants were business invitees the standard of care owed them is one of ordinary care to prevent reasonably foreseeable accidents and injuries. S.S. Kresge Co. v. Fader (1927), 116 Ohio St. 718. Appellees also urged that they did not have a sufficient period of notice to either correct the depression or warn of its presence. S.S. Kresge Co., supra. The court granted summary judgment in favor of appellees.

From said judgment, appellants set out the following four assignments of error:

> "1. Trial court erred in granting the motion of defendants for summary judgment for the reason that its judgment is contrary to law.
>
> "2. The trial court erred in granting the motion of defendants for summary judgment for the reason that the trial judge violated Ohio Rule of Evidence 602 [Lack Of Personal Knowledge], to the prejudice of plaintiffs.
>
> "3. The trial court unconstitutionally applied Ohio Rule of Evidence 407 [Subsequent Remedial Measures] to the prejudice of plaintiffs.
>
> "4. The trial court judge had a personal bias and prejudice against the two Hispanic plaintiffs to the extent that it prevented the trial judge from exercising his judicial functions impartially in plaintiffs' case, in direct violation of plaintiffs' Fourteenth Amendment Due Process and Equal Protection rights."

In their first assignment of error, appellants contend that in granting summary judgment, the trial court's

decision was contrary to law as announced by the Ohio Supreme Court in Cash v. Cincinnati (1988), 66 Ohio St. 2d 319, and Helms v. American Legion, Inc. (1966), 5 Ohio St. 2d 60.

In Cash, the court held that it was for the jury to determine whether the defendant was negligent in allowing a depression in a crosswalk approximately twelve to fourteen inches wide and one and one-half inches deep to remain unrepaired. However, the court clearly differentiated its holding in Cash from other similar cases. In Cash, the court noted, circumstances surrounding the depression existed that did not render such a "defect insubstantial as a matter of law." Such circumstances in Cash included a busy downtown intersection, poor visibility and surrounding vehicular traffic. None of the distractions referred to in Cash are present in this case. Appellants do

not allege poor visibility or obstructed vision.

Appellants would have the court focus much of its attention on the size of the depression. Appellants contend that because the overall dimensions of the depression were larger than Cash that its potential for peril was an issue for the jury. Much of this argument is misplaced. The overall dimensions of the depression are relatively unimportant because appellant's fall occurred as he attempted to place his weight on the edge of the depression. This indicated that the focus should be on the disparity in elevation rather than expanse of the depression.

Appellants provide no evidence as to the depth of the depression. Conversely, appellees present two affidavits indcating the depth to be anywhere from "less than one inch" (affidavit of Robert Richard) to "one and one-half inches"

(answer of Greg Shetzer). Construing the evidence most strongly in favor of appellants (Civ. R. 56(C)), a depression with a depth of one and one-half inches is not so dangerous as to create a question for the jury as a mater of law. Kimball v. Cincinnati (1953), 160 Ohio St. 370. In what has been referred to as the "two-inch doctrine," see Gallagher v. Toledo (1959), 168 Ohio St. 508; Buckley v. Portsmouth (1959), 168 Ohio St. 513; Kindle v. Arkon (1959), 169 Ohio St. 373, the Kimball court held that a "slight defect" did not create a question of fact for the jury as a matter of law. The holding in Kimball was extended to owners and occupiers of private premises in Helms v. American Legion, Inc., supra.

Appellants assert that the trial court "usurped the power of the Supreme Court" in applying Helms to the case sub judice. Appellants argue that the trial court abused its discretion by

failing to consider all attendant circumstances before granting appellees' summary judgment motion. This argument is also without merit.

> "The trial court's judgment [will not] be disturbed on appeal absent a showing that the trial court abused its discretion (citations omitted). *** The term 'abuse of discretion' connotes more than an error or law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." Blakemore v. Blakemore (1983), 5 Ohio St. 3d 217 (citations omitted).

As observed by the trial court, appellants failed to personally obtain the measurement of the depression, choosing instead to rely on appellees' affidavits. Appellants also failed to present evidence of unique circumstances to distinguish their cause of action from Helms and make summary judgment an inappropriate disposition. Therefore, the trial court's attention was properly directed to the difference in elevation noted in each case and their adherence

to Kimball, making each cited case applicable to the case sub judice.

Summary judgment is properly "granted when it appears from the evidence submitted that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made ***." Adkins v. Ontario (1983), 8 Ohio St. 3d 45. Appellants have failed to adduce, nor will they be able to do do, enough evidence to address these issues at trial.

For all of the aforestated reasons, appeallants' first assignment of error is found not well-taken.

Appellants' second assignment of error concerns the trial court's application of Ohio Evid. R. 602. Evid. R. 602 provides in part that:

> "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evi-

> dence to prove personal knowledge may, but need not, consist of the testimony of the witness himself."

Appellants claim that appellee Robert Richard did not know where the incident took place and, therefore, did not have the requiste personal knowledge necessary for acceptable testimony regarding size and depth of the depression.

In his affidavit Richard stated that he learned of the location of the depression from appellee Kathy Rose. According to the testimony of Mrs. Torres, Rose was advised as to the location of the incident immediately after it happened. Accordingly, Rose acquired personal knowledge as to where the incident occurred. Rose subsequently and without any indication of uncertainty or hesitation, led Richard to the site, thereby allowing him to obtain personal knowledge regarding the location of the depression.

Accordingly, the trial court

did not err in its application of Ohio Evid. R. 602. The affidavit of Robert Richard was properly admitted as evidence of the depth of the depression.

For the aforestated reason, appellants contend that the trial court misapplied Ohio Evid. R. 407 to the prejudice of the appellants. Evid. R. 407 provides:

> "When, after an event, measures are taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose ***."

Appellants contend that because appellees made repairs to the area in question a short time after the incident, appellants were prevented from measuring the depression. Noting that summary judgment was granted in part on the basis of the trial court's conclusion that ap-

pellants failed to obtain their own measurement, nor would they be able to because of subsequent repairs to the area, appellants assert that Evid. R. 407 was violated. Appellants argue that in considering the repairs, the trial court breached Evid. R. 407. Appellants' claim is unfounded.

In addition to the fact that no reference to Evid. R. 407 is made in the decision below, the second sentence of Evid. R. 407 "does not require the exclusion of evidence of subsequent measures when [the evidence is] offered for another purpose ***." In this case, the "other purpose" was to establish that appellants would be precluded from gathering further evidence at the site of the incident. There is nothing in the record to indicate that inclusion for this purpose was improper or prejudicial to appellants.

Appellants also dwell on the

trial court's alleged failure to provide additional time for them to personally ascertain the dimensions of the hole. This claim is also contrary to evidence and without merit.

During the time between when appellants were made aware of the identity of the contractor conducting the repairs to appellees' premises and the day the motion for summary judgment was filed, appellants made no attempt to depose the contractor regarding the size of the hole. Appellants' failure to obtain timely the eyewitness testimony of the contractor considered in addition to the repairs, made it proper for the trial court to conclude that appellants would fail to produce additional evidence regarding the dimensions of the hole at trial. Therefore, it was proper for the trial court to rely solely on the statements of appellees Robert Richard and

Greg Shetzer concerning the size of the depression.

A party opposing a motion for summary judgment,

> "[M]ust establish, by specific facts, that there is a genuine issue for trial in order to avoid summary judgment (citation omitted). Unsupported allegations in opposition to a motion for summary judgment are insufficient to require denial of the motion." Albritton v. Neighborhood Centers Assn. (1984), 12 Ohio St. 3d 210 (citations omitted).

For all of the aforestated reasons, appellants' third assignment of error is not well-taken.

In their fourth assignment of error, appellants contend that the trial judge had a personal bias against the Hispanic heritage of appellants so as to deprive them of their constitutional rights of Due Process and Equal Protection.

It is unnecessary to reach this

assignment of error as presented by appellants. Assuming appellants are suggesting the trial judge should have removed himself from the instant case, appropriate procedure dictates that:

> "[a]uthority to pass upon the disqualification of a judge of the Court of Common Pleas is vested in the [Ohio] Chief Justice under section 5(C) of Article IV of the Ohio Constitution ***." Beer v. Griffith (1978), 54 Ohio St. 2d 440.

The proper disqualification procedure is enumerated in R.C. 2701.03. This section requires an affidavit be filed "setting forth the fact of the interest, bias, prejudice, or disqualification." The affidavit must be filed "not less than three days prior to the time set for the hearing in the matter or cause." R.C. 2701.03.

> "Since only the Chief Justice or his designee may hear disqualification matters, the Court of Appeals [is] without authority to pass upon the dis-

> qualification or to void the judgment of the trial court upon that basis." Beer, Supra.

Therefore, in light of R.C. 2701.03, we need not decide the constitutional issues raised by appellants. Courts will avoid constitutional questions when nonconstitutional rulings are dispositive. Greenhills Home Owners Corp. v. Village of Greenhills (1966), 5 Ohio St. 2d 207, paragraph one of the syllabus.

For the aforestated reason, appellants' fourth assignment of error is not well-taken.

More than a mere cautionary statement, however, is directed to appellants. It should be noted that "there is a presumption of the trial judge's impartiality," State v. Browning (1967), 9 Ohio Misc. 228, which must be overcome by the party requesting disqualification.

> "In the absence of some showing to the contrary, there is a presumption that the trial

> judge performed his duty and did not rely upon anything in reaching his decision that he should not have relied upon." City of Columbus v. Guthmann (1963), 175 Ohio St. 282.

Additionally,

> "it is well-recognized in trial court circles that the mere filing of an affidavit often intensifies the feeling of the judge against the person who originates it. Such a charge is not complimentary, is felt by the recipient to be derogatory and generlly reflects on the strength of the character of the trial judge." State v. Browning, supra.

A review of the record fails to reveal any indication of partiality and prejudice on the part of the trial judge. Such suggestions and allegations by counsel should only be set forth where a reasonable and well-founded basis for such serious accusations is present.

On consideration whereof, the court finds substantial justice has been done the party complaining, and the judgment of the Wood County of Common Pleas

is affirmed. Appellants are ordered to pay the court cost of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

John J. Connors, Jr., J. s/s
JUDGE

Peter M. Handwork, J. s/s
JUDGE

George M. Glasser, J. s/s
CONCUR. JUDGE

1987 JUL 21 AM 9:44

BETTY J. HAAS
CLERK

IN THE COURT OF COMMON PLEAS OF
WOOD COUNTY, OHIO

Santos Torres, et al. Plaintiffs, vs. J. F. Enterprises, Inc., et al. Defendants.	Case No. 86-CIV-255 ORDER AND JUDGMENT ENTRY GRANTING MOTION

This cause came before this Court on the motion of the defendants requesting summary judgment against plaintiffs' on their complaint.

Oral arguments having been waived or found unnecessary, the Court reviewed all pleadings, affidavits and memoranda which have been filed in this cause.

The Court on due consideration finds the motion well taken and that it should be granted for the reasons set forth in the Memorandum Decision attached.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment is granted. This case is therefore dismissed with prejudice at the plaintiffs' costs.

s/s
Judge Gale Williamson

xc: Walton H. Donnell
Joseph P. Dawson

1987 JUL 21 AM 9:44
BETTY J. HAAS
CLERK

IN THE COURT OF COMMON PLEAS OF
WOOD COUNTY

Santos Torres, et al.
Plaintiffs,

vs.

J. F. Enterprises, Inc., et al.
Defendants.

Case No. 86-CIV-255

MEMORANDUM DECISION

This cause is before this Court on the motion for summary judgment filed by defendants pursuant to Rule 56 of the Ohio Rules of Civil Procedure. Defendants move for summary judgment in their favor and against plaintiffs on the personal injury claim of Santos Torres and the loss of consortium and infliction of emotional distress claims of his wife, Esther Torress. The Court has before it the pleadings of the parties, defendants' memorandum in support of its motion (to which is attached the affidavit of

Robert Richard, President of J. F. Enterprise, Inc.), and plaintiff's motion to deny defendants' motion with supporting memorandum (to which are attached the affidavits of Santos and Esther Torres).

FACTS

On September 6, 1985, plaintiff Santos Torres, drove his van to the gas station owned by defendant J. F. Enterprises, Inc. As he exited the van to operate defendants' self-service gas pumps, Mr. Torres stepped into what he describes as an elongated hole in the surface of the pump area and triped injuring his right foot and knee. Employees of the station, defendants Greg Shetzer and Kathy Rose, situated approximately forty feet away did not observe Mr. Torres stepping in the hole but Mrs. Torres reported the incident to defendants Shetzer and Rose. Mr. Torres asserts the injury occurred at an island

on the north side of the premises.

On September 9, an employee of the station showed Mr. Richard a depression in the pavement where the pump island met the surrounding paved surface. The employee believed that this was where Mr. Torres had tripped. Mr. Richard observed that the depression was approximately two feet square and less than one inch deep.

In August of 1985, there existed another defect in the pavement around the northern pumps island. This consisted of crack approximately fifteen feet long and of unknown depth where the pavement had settled. In August the contractor agreed to repair this crack and a repavement of the pump area was finished sometime in September of 1985. Mr. Torres is unable to give a size description of the hole where he was injured and has returned to the site of

the injury only to find that the entire area is smooth, without depressions of any kind. The defendant, Gregory Shetzer examined the crack and found there to be an elevation difference of about 1 1/2 inches at the crack.

DISCUSSION

Defendants have moved for summary judgment in their favor as a matter of law relying upon the so-called "two-inch doctrine" set forth in Kimball v. Cincinnati (1953), 160 Ohio St. 370, and its progeny. According to this doctrine, a hole or unevenness in the surface of an area traversed by pedestrians which is less than two inches in depth, may be found, in light of the attending circumstances, to be a "minor" or "trivial" imperfection in the surface such that the owner thereof is not liable to those injured by the condition as a matter of law. See Kimball v. Cincinnati, supra;

Gallagher v. Toledo (1959), 168 Ohio St. 508; Buckley v. Portsmouth (1959), 168 Ohio St. 513; Amos v. Cleveland Heights (1959),169 Ohio St. 367; Kindle v. Akron (1959), 169 Ohio St. 373; Helms v. American Legion, Inc. (1966), 5 Ohio St. 2d 60; Cash v. Cincinnati (1981), 66 Ohio St. 2d 319. Although, as admitted by defendants in their motion, there does not appear to be any reported Ohio decisions dealing wiht imperfections in filling station driverways or other areas traversed by both pedestrians and motorists, the basic rationale of the Kimball decision seems applicable to the case at bar. Owners of premises commonly traveled by members of the public are not insurers against injury caused by minor imperfections in the surface area which are commonly encountered and to be expected by the traveler. Helms, supra, syllabus. Whether Mr. Torres was a

"pedestrian" or a "motorist" when he was injured as he stepped from a motor vehicle is not determinative in applying the two-inch doctrine to the circumstances of this case.

Before the Court may render summary judgment pursuant to Rule 56 of the Ohio Rules of Civil Procedure, the defendants must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. When a defendant's motion for summary judgment alleges that the facts will not support a legal basis for liability even if proven, a summary judgment may be considered. A summary judgment is similar to a dismissal for failure to state a claim for which relief can be granted. Kwait v. John David Managment Co. (1974), 42 Ohio App. 2d 63, 329 N.E. 2d 702, paragraph three of the syllabus. Plaintiffs, in their opposing

motion, assert that genuine fact issues exist concerning the size and location of the hole where Mr. Torres was injured. However, plaintiffs have plainly demonstrated, first in their complaint and again in their supporting affidavits, that they will be unable to adduce evidence addressing these issues at trial because plaintiffs either failed to observe or obtain measurement of the hole's dimensions. At trial the plaintiffs will not be able to more than reiterate the unsupported allegations of their complaint in response to Mr. Richard's or Mr. Shetzer's testimony regarding the depth of the hole. Although unsupported allegations in the pleadings is not a sufficient ground for granting summary judgment, the basic role of summary judgment is "to move beyond allegations in pleadings, and to analyze the evidence so as to ascertain whether an act-

ual need for a trial exists." Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St. 2d 64, 66. Applying this principle to the case sub judice, defendants' motion for summary judgment must be granted if it is apparent that plaintiffs will not be able to establish that the hole was of sufficient dimension to create a breach of the defendants duty to protect members of the public from unreasonable risks. Construing the evidence before the Court most strongly in the plaintiffs' favor, it appears inevitable that plaintiffs will not be able to establish a prima facie case of negligence in the absence of any proof whatsoever concerning the size of the hole where plaintiff was injured. The evidentiary presumption of res ipsa loquitur is unavailable in the plaintiffs case in the absence of evidence tending to show that Mr. Torres' injuries would ordinar-

ily have occurred only by a breach of defendants duty of care. Morgan v. Childrens' Hosp. (1985), 18 Ohio St. 3d 185. For this reason, defendants' motion for summary judgemnt in their favor must be granted on Mr. Torres' negligence claim. Also, because Mrs. Torres' claims are derivative to Mr. Torres' negligence cause of action, summary judgment must be granted in favor of defendants on the loss of consortium and infliction of emotional distress claims as well.

s/s
Judge Gale Willimson

xc: Walton H. Donnell
Joseph P. Dawson

The Supreme Court of Ohio

Columbus

Santos Torres et al., Appellants,	:	1988 TERM
v.	:	To wit: May 25, 1988
J. F. Enterprises, Inc., Appellee.	:	Case No. 88-669

E N T R Y

Upon consideration of the motion for an order directing the Court of Appeals for Wood County to certify its record, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Walter (sic) H. Donnell.

s/s
THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 25th day of May, 1988.

MARCIA J. MENGEL CLERK

s/s DEPUTY

FILED
WOOD COUNTY, OHIO
COURT OF APPEALS
MAY 31 1988
Rebecca E. Bhaer Clerk

IN THE COURT OF APPEALS OF
WOOD COUNTY, OHIO

Santos Torres, et al., Plaintiffs-Appellants,	:	CASE NO-WD-87-55
- vs -	:	TRIAL COURT NO.-86-CIV-255
J. F. Enterprises, Inc., Defendant-Appellee.	:	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Santos Torres and Esther Torres, appellants in the above-named action, appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of Wood County, Ohio, Sixth District, dated March 31, 1988, which judgment was denied review by the

the Supreme Court of Ohio in an Entry dated May 25, 1988, dismissing appellants' appeal to the state's highest court.

The record is in this Court of Appeals whose judgment of March 31, 1988 affirmed the judgment of the trial court, the Common Pleas Court of Wood County, Ohio, dated July 21, 1987.

Pursuant to Title 28 USC §1257(2).

s/s
Walton H. Donnell
ATTORNEY FOR APPELLANTS
742 Otsego Pike, P.O. Box 733
Bowling Green, OH 43402
Telephone- (419) 278-2483

DATED: May 31, 1988.

PROOF OF SERVICE: A copy of the foregoing Notice of Appeal to the United States Supreme Court was sent by First Class U.S. Mail to attorney Joseph P. Dawson, 900 Adams Street, P.O. Box 1568, Toledo, OH 43603 this May 31, 1988.

s/s
Walton H. Donnell

FILED
COURT OF APPEALS
MAR 11 1988

LUCAS COUNTY OHIO
Carol A. Pietrykowski, Clerk

COURT OF APPEALS OF OHIO, SIXTH DISTRICT

COUNTY OF LUCAS

C. A. NO. L-87-159

Delton D. Opfer
APPELLEE
CROSS-APPELLANT

-VS-

Lory Arnold, Jr.
APPELLANT
CROSS-APPELLEE

APPEAL FROM

LUCAS COUNTY
COMMON PLEAS
COURT

DECISION AND
JOURNAL ENTRY

DATE: March 11, 1988

This cause is before the court on appeal and cross-appeal from a judgment of the Lucas County Court of Common Pleas.

Defendant-appellant/cross-appellee, Lory Arnold, Jr. (hereinafter referred to as appellant), together with an uninvolved third party, was operating a business known as "Small Engine Repair" since April 1983. Subsequently in April 1984, the

third party left the firm and plaintiff-appellee/cross-appellant, Delton D. Opfer hereinafter referred to as appellee) purchased an interest in the business. Pursuant to an oral partnership agreement, appellee was to receive a fifty percent interest in the business and was to match appellant "dollar for dollar" in income generated by work done by the business. In August 1985, appellee indicated his desire to end the partnership, ultimately giving rise to the instant action.

Trial commenced in March 1987, with the trial court framing the issues as (1) whether the partnership was dissolved in August 1985 by separate agreement between the parties in which appellee allegedly agreed to accept $4,000 for his interest in the business; (2) if the partnership was dissolved, how much is appellee entitled to receive for his fifty percent interest in the business; and (3) if the

partnership was not dissolved by agreement of the parties, should it now be dissolved and the assets distributed by the court.

As noted by the trial court, the parties herein entered into a relatively loose oral agreement, without benefit of counsel, involving relatively large amounts of money and a continuing business relationship. Upon considering all of the evidence that was presented at trial, the trial court found as follows:

> "1. In April of 1984, the parties entered into a partnership agreement in which Plaintiff paid Defendant $3,700.00 and received in return a full 50% interest in the business.
>
> "2. Under the agreement, Plaintiff was responsible for matching Defendant dollar for dollar in income produced to the business through work performed for customers.
>
> "3. During the life of the agreement, Plaintiff was obligated to the partnership for any deficiency in the dollar for dollar contribution that resulted due to his inability to work.
>
> "4. Under the agreement, Plaintiff was to pay an additional amount to

obtain a 50% interest in the tools. Plaintiff did not make this payment; the tools remained the property of the Defendant and never became partnership property.

"5. The partnership was dissolved by agreement of the parties in August of 1985.

"6. In their agreement to dissolve the partnership, the parties did not come to a meeting to the minds as to the amount that Plaintiff would received [sic] for his 50% interest in the partnership.

"7. Since there is no accounting available for the specific period of the partnership, this court values Plaintiff's interest in the partnership as follows:

"a. Income attributable to Plaintiff that was returned to the business in the amount of

1984----$3819.15

1985---- 3883.71

"b. 50% of the additional payment made to Defendant in 1985 ($3400)

---- 1700.00

"c. 50% of the value of the business as set at the time the agreement was entered into

---- 3700.00

"8. Plaintiff is entitled to receive 50% of the amount paid to the business in 1986 for the separate welding job done by him, ($1400)

700.00;

"9. Plaintiff is responsible to Defendant for a deficiency in th dollar for dollar match portion of the agreement in th amount of 4,179.90;

"10. Plaintiff is entitled to receive from Defendant his 50% interest in the business in the amount of $9,622.96."

From said judgment appellant filed a timely notice of appeal with appellee filing a subsequent cross-appeal. Each party's assignments of error will be discussed in turn. Initially, we look to appellant's assignments of error which state as follows:

"1. The judgment is not sustained by the evidence and is against the manifest weight of the evidence.

"2. A state official, the trial judge, had a personal bias or prejudice for plaintiff to the extent that it prevented him from exercising his judicial functions impartially in defendant's case, in direct violation of defendant's Fourteenth Amendment Due Process right."

Appellant alleges in the first assignment of error that the decision of

the trial court was against the manifest weight of the evidence. As stated by the Ohio Supreme Court in C.E. Morris v. Foley Construction Co. (1978), 54 Ohio St. 2d 279, 280:

> "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence."

It is well settled that the conclusions of the trier of fact enjoy a presumption of validity in determining whether the judgment below is manifestly against the weight of the evidence. Hines v. Amole (1982), 4 Ohio App. 3d 263 266. The rationale for such a presumption was succinctly stated in Seasons Coal Co. v. Cleveland (1984), 10 Ohio St. 3d 77, 80, whereby the Ohio Supreme Court stated:

> "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflec-

> tions, and use these observations in weighing the credibility of the proffered testimony."

With these standards established, we now turn to appellant's argument. Initially, appellant contends that there was no evidence to support the trial court's finding of fact number 6 which states that there was no "meeting of the minds" as to the amount appellee would receive for his fifty percent interest in the partnership. Appellant contends that the $4,000 buy-out offer he made to appellee was accepted by appellee. Appellee testified that he did not accept appellant's offer. Both sides produced an additional witness to support their positions. Ultimately, the decision as to whose testimony was more credible rested with the trial court. As noted above, the trial court was in the best position to view witnesses and observe their demeanor. Based on such observations and in light

of the lack of any written documentation, the trial court acted well within the scope of its authority in finding that the parties did not come to a mutual understanding as to the valuation of appellee's fifty percent interest in the partnership.

Appellant also contends that it was against the manifest weight of the evidence for the trial court to fail to credit appellant for an additional $1,100 he allegedly invested in the partnership and in the court's refusal to award him an amount for tool rental. As to appellant's alleged $1,100 credit, appellant's self-serving statement was not corroborated by any additional evidence nor was there any record of such investment ever being made. Further, as to the tools, appellee testified that he believed the funds used to initially buy into the partnership included use of all tools

(the tools were not partnership property). Appellant, however, testified as to his understanding that appellee was to pay appellant an amount for rent for use of appellant's tools. As noted supra, these matters involve issues of credibility and deference must be given the findings of the trial court. The trial court after reviewing all of the evidence, including the testimony of the witnesses, chose not to include these claims in the final award. Because there was competent, credible evidence, it cannot be said that the judgment of the trial court as to these issues was against the manifest weight of the evidence. Accordingly, appellant's first assignment of error is without merit and found not well-taken.

In the second assignment of error, appellant contends that the trial judge had a personal bias or prejudice in favor of appellee. Appellant asserts that dur-

ing trial, the judge became too involved in the proceedings thereby taking on an adversarial role in violation of appellant's Fourteenth Amendment Due Process rights. We disagree.

We note, upon review of the transcript of proceedings, that the trial judge did intervene during the questioning of certain witnesses. The purpose of such intervention, however, was to clarify unclear and complex questions posed to the witnesses by counsel. This is neither prejudicial nor biased behavior, rather, competent and responsible action on the part of the trial judge. Accordingly, appellant's second assignment of error is without merit and found not well-taken.

Turning to the cross-appeal, appellee sets out the following assignments of error:

"I. THE TRIAL COURT ERRED IN FAIL-

ING TO APPLY SECTIONS OF OHIO'S UNIFORM PARTNERSHIP LAW IN COMPUTING THE VALUE OF THE PLAINTIFF'S SHARE IN THE DISSOLVED PARTNERSHIP AND BY IGNORING GENERAL EQUITABLE PRINCIPLES IN FASHIONING ITS AWARD.

"II. THE TRIAL COURT ERRED IN COMPUTING ITS AWARD BY NOT INCLUDING INTEREST PURSUANT TO O.R.C. SECTION 1775.41.

"III. THE TRIAL COURT ERRED IN ASSESSING THE PLAINTIFF $4,179.90 FOR TIME NOT MATCHED 'DOLLAR FOR DOLLAR' WITH THE DEFENDANT, AS THERE WAS NO CREDIBLE EVIDENCE SUVMITTED TO THAT EFFECT AND THE PLAINTIFF WAS PREVENTED BY THE DEFENDANT FROM SO MATCHING."

In the first assignment of error, appellee contends that the trial court erred in failing to apply sections of Ohio's Uniform Partnership law in computing the value of appellee's share in the partnership. The trial court found that the partnership between the parties was dissolved in August 1985. With no accounting available, the trial court, as noted above, valued appellee's interest in the partnership as follows:

a. Income attributed to appellee that was returned to the business (ordinary income)

1984	$3,819.15
1985	3,883.71

b. 50% of the amount withdrawn by appellant in 1985 ($3,400)

1,700.00

c. 50% of the value of the business at the time appellee entered the partnership (appellee's initial contribution)

3,700.00

d. 50% of the amount received by the partnership for a separate welding job done by appellee in 1986 ($1,400)

700.00

e. Appellee's deficiency in the "dollar for dollar" match portion of the agreement

(4,179.90)

Thus, the trial court found appellee was entitled to receive from appellant $9,622.96 representing his fifty percent share in the partnership after including all necessary additions and deductions.

The provisions of the Ohio Uniform Partnership Act codify and clarify the complex legal relationship that arises

between individuals when partnerships are formed. Partnerships are unique entities in that the involved parties are relatively free to define for themselves the parameters of their relationship. It is not necessary that an agreement of partnership be in any particular form. The cornerstone of a partnership is that the parties, by mutual consent, have the ability to structure their relationship anyway they desire. As with any relationship, however, problems may arise requiring a court to intervene.

The agreement between the parties in the case sub judice was loosely structured with nothing reduced to writing. The trial court correctly observed that:

> "While it is certainly obvious that the legal effect of what was or was not included in the agreement was not given much consideration at the time it was entered into, both parties are now asking this court to analyze this agreement in strict legal terms and pronounce its strict legal effect.*** The fruits of that

> exercise are minimal, however, since, as is always the case in such transactions, it is obvious that what was said by one of the parties was not necessarily what was heard by the other."

Because the agreement between the parties is incomplete, we must turn to the provisions of the Ohio Uniform Partnership Act for assistance in establishing the rights of the parties upon dissolution of their partnership. R.C. 1775.39 states in pertinent part as follows:

> "1775.39 Rules for settling accounts between partners after dissolution
>
> "In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:
>
> "(A) The assets of the partnership are:
> (1) The partnership property;
> (2) The contributions of the partners necessary for the payment of all the liabilities specified in division (B) of this section.
>
> "(B) The liabilities of the partnership shall rank in order of payment, as follows:
> (1) Those owing to creditors other than partners;

(2) Those owing to partners other than for capital and profits;
(3) Those owing to partners in respect to capital;
(4) Those owing to partners in respect of profits.

"(C) The assets shall be applied in the order of their declaration in division (A) of this section to the satisfaction of the liabilities."

In reviewing the evidence before the trial court the assets of the partnership upon dissolution totaled $39,336.41. Using this figure as a starting point, we now apply the provisions of R.C. 1775.39 (B) in computing appellee's interest.

1775.39(A)	Assets of the Partnership	$39,336.41
1775.39(B)(1)	Those owing to creditors other than partners	9,691.72
1775.39(B)(2)	Those owing to partners other than for capital and profits	0.00

At this point, after deducting the monies owed to creditors other than partners and

amounts owed partners other than for capital and profits, $29,644.69 remains in the partnership capital account. Appellee asserts that his share of the partnership should be based on fifty percent of this amount or $14,822.34. We do not agree. R.C. 1775.39 specifically separtes capital and profits in its distribution scheme and in so doing allows each partner to regain the amount individually invested by way of capital contribution. This is consistent with R.C. 1775.17 which states:

> "1775.17 Rules for determining rights and duties of partners
>
> "The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:
>
> "(A) Each partner shall be repaid his contribution, whether by way of capital or advances, to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied;***" (Emphasis added.)

Therefore, we will determine appellee's

individual captial return and then add to this figure the agreed fifty percent of the profits. In reviewing the evidence before the court, appellee's capital contribution at the point of dissolution consisted of $8,921.78, his capital account at the beginning of the year and $233.31 additional capital contributed during the year. Hence, appellee's capital contribution totaled $9,155.09. We add to this figure $3,883.71 which represents appellee's net earnings for the year (his fifty percent share of the profits for the year). In sum, appellee's share of capital and profits totaled $13,038.80.

Having computed appellee's individual interest in the partnership, we now include the additional factors as found by the trial court:

a.	Appellee's share in the partnership	$13,038.80

b. 50% of additional payment made to appellant in 1895 ($3,400)	1,700.00
c. Separate welding job ($1,400)	700.00
	$15,438.80
Deduction for deficiency in dollar for dollar match portion of the agreement	- 4,179.90
Appellee's total partnership share	$11,258.90

Additionally, R.C. 1775.41 concerning the rights of a retiring or deceased partner states as follows:

> "When any partner retires or dies, and the business is continued *** without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right and the property of a dissolved partnership.***"

Accordingly, appellee is entitled to the interest that has accrued since the date of dissolution on his $11,258.90 share of the partnership. R.C. 1343.03 states that upon a judgment or settlement between parties arising out of a contract or other transaction "the creditor is entitled to interest at the rate of ten percent per annum ***." Appellee, therefore, is entitled to the interest, at ten percent per annum, that has accrued on his $11,258.90 share of the partnership assets as of the date of dissolution. Accordingly, appellee's first assignment of error is found well-taken in part.

Arguing in the alternative, appellee's second assignment of error states that the trial court erred in not granting appellee's interest on the trial court judgment award. In light of our disposition of the first assignment of error, appellee's second assignment of error is

found moot and not well taken.

In the third assignment of error, appellee states that the trial court erred in assessing appellee $4,179.90 for time not matched "dollar for dollar" with appellant. As was noted supra in appellants first assignment of error, in viewing the issue of credibility of witnesses, deference must be given the findings of the trial court. See Seasons Coal Co. v. Cleveland, supra. The trial court acted within its boundaries in finding appellant's testimony credible and awarding monies based on a deficiency in the "dollar for dollar" match portion of the parties agreement. Accordingly, appellee's third and final assignment of error is without merit and found not well-taken.

On consideration whereof, this court finds that substantial justice has been done the appellant in the case sub judice, while substantial justice has not been

done the appellee and the judgment of the Lucas County Court of Common Pleas is affirmed in part and reversed in part. Pursuant to App. R. 12(B), this court enters the judgment that the trial court should have entered, that the appellee is entitled to receive from appellant the amount of $11,258.90 representing his share of the partnership, plus ten percent interest per annum as of the date of dissolution. Appellant is ordered to pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See, also, Supp. R. 4, amended 1/1/80.

Alice Robie Resnick ,P.J., _____
PRESIDUBG JUDGE

Peter M. Handwork, J., and _____
JUDGE

George M. Glasser, J. _____
CONCUR. JUDGE

FILED
LUCAS COUNTY
APR 30 9 48 AM '87
COMMON PLEAS COURT
CAROL A PIETRYKOWSKI
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF
LUCAS COUNTY, OHIO

Delton D. Opfer, Plaintiff,	*	Case No. 86-1918
vs.	*	DECISION AND JUDGMENT ENTRY
Lory Arnold, Jr., Defendant.	*	Judge Charles D. Abood

On March 30, 1987, this case was called for trial to the court on Plaintiff's complaint and Defendant's counterclaim. Trial was had and each party was granted leave to file a post-trial memorandum.

The facts of the case that are not in dispute are:

The Defendant, Lory Arnold, Jr., together with a third party had been operating a business known as Small Engine Repair

since April of 1983. In April of 1984, the third party left the business and Plaintiff, Delton D. Opfer, purchased an interest in the business for $3700.00. This amount was paid by Plaintiff to Defendant in cash pursuant to an oral partnership agreement in which Plaintiff was to get a 50% interest in the business and was to match Defendant dollar for dollar in income generated by work done for the business.

Several matters as to the business relationship between the parties remain at issue:

First, was the partnership dissolved by a separate agreement between the parties in August of 1985 in which Plaintiff agreed to accept $4,000.00 for his interest in the business?

Second, if the partnership was dissolved by agreement of the parties in August of 1985, but no agreement was

reached as to the amount Plaintiff was to receive for his 50% interest in the business, how much is Plaintiff entitled to receive for his interest in the business?

Third, if the partnership was not dissolved by agreement of the parties, should it now be dissolved and the assets distributed by this court?

As always in this type of case, the answers to these questions are not easily arrived at. The parties herein entered into a relatively loose agreement, without the help of legal counsel and without reducing it to writing, involving relatively large amounts of money and a continuing business relationship. While it is certainly obvious that the legal effect of what was or was not included in the agreement was not given much consideration at the time it was entered into, both parties are now asking this court to analyze this agreement in strict legal terms and pro-

nounce its strict legal effect. That is no easy task. To begin with, since nothing is in writing, this court must look to the words and actions of the parties in an effort to decipher the terms on which their minds did meet both in entering into and in dissolving (if in fact it has been dissolved) the partnership. The fruits of that exercise are minimal, however, since, as is always the case in such transactions, it is obvious that what was said by one of the parties was not necessarily what was heard by the other.

In the face of these difficulties, when considering all of the evidence that was presented at trial, the written arguments of counsel and the law that applies to this case, this court finds:

1. In April of 1984, the parties entered into a partnership agreement in which Plaintiff paid Defendant $3,700.00 and received in return a full 50% inter-

est in the business.

2. Under the agreement, Plaintiff was responsible for matching Defendant dollar for dollar in income produced to the business through work performed for customers.

3. During the life of the agreement, Plaintiff was obligated to the partnership for any deficiency in the dollar for dollar contribution that resulted due to his inability to do the work.

4. Under the agreement, Plaintiff was to pay an additional amount to obtain a 50% interest in the tools. Plaintiff did not make this payment; the tools remained the property of the Defendant and never became partnership property.

5. The partnership was dissolved by agreement of the parties in August of 1985.

6. In their agreement to dissolve

the partnership, the parties did not come to a meeting of the minds as to the amount that Plaintiff would received (sic) for his 50% interest in the partnership.

7. Since there is no accounting available for the specific period of the partnership, this court values Plaintiff's interest in the partnership as follows:

a. Income attributable to Plaintiff that was returned to the business in the amount of

1984----$3819.15

1985---- 3883.71

b. 50% of the additional payment made to Defendant in 1985 ($3400)

---- 1700.00

c. 50% of the value of the business as set at the time the agreement was entered into

---- 3700.00

8. Plaintiff is entitled to receive 50% of the amount paid to the business in 1986 for the separate welding job done by him, ($1400) 700.00;

9. Plaintiff is responsible to Defendant for a deficiency in the dollar for dollar match portion of the agreement in the amount of 4,179.90;

10. Plaintiff is entitled to receive from Defendant his 50% interest in the business in the amount of $9,622.96.

JUDGMENT ENTRY

It is hereby ordered that Plaintiff is granted judgment against Defendant in the amount of $9,622.96 plus court costs.

It is further ordered that judgment is hereby rendered for the Plaintiff on Defendant's counterclaim.

s/s
Charles D. Abood, Judge

The Supreme Court of Ohio

Columbus

1988 TERM

To wit: May 25, 1988

Delton D. Opfer,
Appellee,

v.

Lory Arnold, Jr.,

Appellant.

Case No. 88-668

E N T R Y

Upon consideration of the motion for an order directing the Court of Appeals for Lucas County to certify its record, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Walton H. Donnell.

s/s
THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court,

to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 25th day of May, 1988.

MARCIA J. MENGEL CLERK

s/s DEPUTY

FILED
COURT OF APPEALS
MAY 31 1988
LUCAS COUNTY, OHIO
Carol A. Pietrykowski,Clerk

IN THE COURT OF APPEALS OF
LUCAS COUNTY, OHIO

Delton D. Opfer,	:	CASE NO.- L-87-159
Plaintiff-Appellee,	:	
-vs-	:	TRIAL COURT NO.- 86-1918
Lory Arnold, Jr.,	:	NOTICE OF APPEAL TO
Defendant-Appellants.	:	THE SUPREME COURT OF THE UNITED STATES

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Lory Arnold, Jr., defendant-appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of Lucas County, Sixth Appellate District, dated March 11, 1988, which judgment was denied review by the Supreme Court of Ohio in an Entry dated May 31, 1988, dismissing

defendant-appellant's appeal to the state's highest court.

The record is in this Court of Appeals whose judgment of March 11, 1988, afffirmed the judgment of the trial court, the Common Pleas Court of Lucas County, Ohio, dated April 30, 1987.

Defendant's appeal taken pursuant to Title 28 USC §1257(3).

s/s
Walton H. Donnell
ATTORNEY FOR DEFENDNAT-APPELLANT
742 Otsego Pike, P.O. BOx 733
Bowling Green, OH 43402
Telephone: (419) 278-2483

PROOF OF SERVICE: A copy of the foregoing Notice of Appeal to the Supreme Court of the United States was sent by First Class Mail to attorney Timothy Connors, Suite 800 First Federal Plaza, Toledo, OH 43624-1671.

s/s
Walton H. Donnell

(2)

No. 88-183

Supreme Court, U.S.
FILED
SEP 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

SANTOS TORRES, *et al.*,
Petitioners,

vs.

J. F. ENTERPRISES, INC., *et al.*,
Respondents,

and

LORY ARNOLD, JR.,
Petitioner,

vs.

DELTON D. OPFER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO COURT OF APPEALS
FOR THE SIXTH APPELLATE DISTRICT

JOINT BRIEF OF RESPONDENTS

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

1-2

I.

QUESTIONS PRESENTED FOR REVIEW

1. Whether Rule II, §§3 and 9 of the Ohio Supreme Court Rules of Practice are repugnant to the Constitution of the United States by allowing the Ohio Supreme Court to *sua sponte* consider an appeal as of right (*viz.*, a case allegedly involving a substantial constitutional question) as on a motion to dismiss the appeal for not involving any substantial constitutional question, and to not require the production of the record in its evaluation of the motion to dismiss.

2. Whether the referenced Rules of Practice of the Ohio Supreme Court deny due process or equal protection to appellants pursuing appeals as of right where the Ohio Supreme Court resolves the merits of the appeals based upon the respective memoranda of the parties, unsupported by the record.

II.

28.1 STATEMENT

J. F. Enterprises, Inc. is a wholly owned corporation in the State of Ohio. It has no parent corporation, affiliates or subsidiaries.

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No. 88-183

IN THE

Supreme Court of the United States

October Term, 1988

SANTOS TORRES, *et al.*,
Petitioners,

vs.

J. F. Enterprises, Inc., *et al.*,
Respondents,

and

LORY ARNOLD, JR.,
Petitioner,

vs.

DELTON D. OPFER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO COURT OF APPEALS
FOR THE SIXTH APPELLATE DISTRICT

JOINT BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

Both petitioners received adverse rulings at the trial level of the respective state court proceedings. Timely appeals were pursued to the state court Court of

Appeals, at which juncture petitioners alleged for the first time that the respective trial courts violated their rights under the Fourteenth Amendment of the United States Constitution. The Courts of Appeals did not find any constitutional violations, but chose in the end analysis to decide the merits of the appeals on non-constitutional questions. (See Petitioners' Appendix.) Both petitioners timely appealed to the Ohio Supreme Court, and subsequently supported their appeals as of right, based upon "substantial constitutional questions", with memoranda in support. Both respondents filed their respective memoranda in opposition to jurisdiction. The Ohio Supreme Court, *sua sponte*, considered the matters as on motions to dismiss the appeals, and determined that the appeals should be dismissed on the basis that there were no substantial constitutional questions involved.

Subsequently, petitioners timely filed their notice of appeal in this Court and presented their petition for writ of certiorari.

SUMMARY OF ARGUMENT

Rule II, §§3, 4 and 9 of the Rules of Practice of the Ohio Supreme Court are not repugnant to the Constitution of the United States and provide appellants with adequate due process and equal protection by first reviewing the parties' respective memoranda for and against jurisdiction. The presentation of the parties' positions by way of memoranda unsupported by the record provides adequate due process and equal protection for the Court to determine whether a substantial constitutional question exists. Further, such a decision by the Ohio Supreme Court is deemed a decision on the merits by this Court and permits unsuccessful appellants at the Ohio Supreme Court level to pursue a writ of certiorari to this Court on the same issues.

Under Ohio law, courts will avoid constitutional questions where non-constitutional rulings on the merits are dispositive. Such was the case here at the state level. The cases at bar are neither special nor important and do not involve any principles of importance to the public.

Accordingly, this petition for certiorari should be denied.

ARGUMENT

The subject petition is apparently based on the manner in which the Ohio Supreme Court ruled upon petitioners' appeals as of right, as opposed to the merits of those decisions. Respondents submit that utilization of Rule II, §§3, 4 and 9 by the Ohio Supreme Court is not repugnant to the Constitution of the United States, nor to the Constitution of the State of Ohio.

Rule II, §4 of the Rules of Practice of the Ohio Supreme Court requires that a notice of claimed appeal as of right be supported by a memorandum which must contain the *same matters* required in a brief on the merits, with the exception that no references to the record need to be cited, as the record is only brought up in the event the appeal is otherwise permitted. Appendix, A1. Respondents have attached Torres' memorandum in support of claimed jurisdiction filed in the *Torres* case as an example of compliance with Rule II, §4. Appendix, A2. That the Ohio Supreme Court, *sua sponte,* treats consideration of the memorandum in support of claimed jurisdiction as a response to a motion to dismiss for failure to state any substantial constitutional question does not deprive appellants of the opportunity to be heard. Clearly, by reviewing petitioners' respective memoranda in support of claimed jurisdiction, the Ohio Supreme Court accorded the petitioners adequate protection of their constitutional rights in the evaluation of their claims.

In *R. J. Reynolds Tobacco Co. v. Durham Co.,* 107 S. Ct. 499, 93 L. Ed. 2d 449 (1986), this Court reviewed the decision of the North Carolina Supreme Court granting the County's motion to dismiss for lack of a substantial constitutional question, thereby denying Reynolds' petition for discretionary review. This Court concluded, for the purpose of appellate jurisdiction under 28 U.S.C.

§1257, that such a decision by the North Carolina Supreme Court dismissing the appeal constituted a decision on the merits, and consequently permitted this Court to evaluate whether a substantial constitutional question was involved. 93 L. Ed. 2d at 459, 460. This Court concluded as follows:

> . . . In the absence of positive assurance to the contrary from the North Carolina Supreme Court, we consider that court's dismissal of Reynolds' appeal to be a decision on the merits. Cf. *Michigan v. Long*, 463 US 1032, 1037-1044, 77 L Ed 1201, 103 S Ct 3469 (1983). With no such contrary assurance in the present record, we conclude that it is the appeal from that court that is the proper one under §1257.
>
> When confronted with a comparable situation arising from Ohio, this Court ruled that the appeal lies from the Ohio Supreme Court and not from that State's Court of Appeals. See *Matthews v. Huwe*, 269 US 262, 265, 70 L Ed 266, 46 S Ct 108 (1925); . . . In *Matthews*, Chief Justice Taft, and Ohioan writing for the Court, explained the appropriateness of the appeal from the Ohio Supreme Court:
>
> > "It is one of those not infrequent cases in which decision of the merits of the case also determines jurisdiction. The petition was dismissed, not because the court was really without jurisdiction, for it could have taken it, but because the question was regarded as *frivolous*, which is a different thing from finding that the petition was not in character one which the court could consider." 269 US, at 265, 70 L Ed 266, 46 S Ct 108.
>
> This reasoning is applicable to the present case; there is no question that the North Carolina Supreme Court had jurisdiction to hear Reynolds' appeal, but it determined not to do so in light of its conclusion that the appeal raised no substantial constitutional question. (emphasis added).

Id. at 460, 461. This Court in *Reynolds,* also approved the very process by which the Ohio Supreme Court reviewed the appeals of the petitioners in the cases at bar. See footnote 7b, at 461. In these cases, the Ohio Supreme Court properly concluded that the appeals of the petitioners raised no substantial constitutional question.

Additionally, petitioners' sought relief actually makes the State of Ohio the real respondent in interest, thereby raising additional precedent to deny this petition based upon the Eleventh Amendment to the U.S. Constitution and related case law. See, Appendix, A43, *Chetister v. Douglas, et al.* (N.D. Ohio, 1985), unreported, No. 84-8077, pp. 6-8 *aff'd* 812 F.2d 1406, *cert. den.* _____ U.S. _____, 95 L. Ed. 2d 817 (1987). Thus, alternatively, this petition is actually directed against the state, the sovereign, and should be denied.

Lastly, it has long been the rule in Ohio that courts will avoid constitutional questions where non-constitutional rulings are dispositive. See *Greenhills Home Owners Corp. v. Village of Greenhills,* 5 Ohio St. 2d 207 (1966). The decisions of the respective Courts of Appeal contained in petitioners' Appendix establish that those courts had ample basis to dispose of these cases on the non-constitutional merits raised therein. In any event, the record is clear that petitioners failed to present any competent evidence that either trial court acted impartially. Further, the petitioners failed to pursue the proper avenues toward having the cases reheard by other judges because of the alleged biases. Petitioners are attempting to circumnavigate the lack of substantial constitutional question on the merits of their cases by attempting to attack the constitutionality of the manner in which the Ohio Supreme Court disposed of those cases. The merits of petitioners' respective cases

are neither special nor important to anyone except the respective parties thereto. Petitioners plainly have failed to provide this Court with any basis upon which it could exercise jurisdiction.

CONCLUSION

A petition for certiorari should be granted only when a case involves "principles a settlement of which is of importance to the public as distinguished from that of the parties . . ." *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951).

This case involves merely the failure of the petitioners to raise any substantial constitutional question on which either the Courts of Ohio or this Court could rule. Accordingly, it involves no great or momentous principle which needs to be decided by this Court. Thus, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

OHIO SUPREME COURT RULES OF PRACTICE

RULE II. DETERMINATION OF JURISDICTION ON APPEALS FROM COURTS OF APPEALS

* * * * *

Section 4. Memorandum in Support of Claimed Jurisdiction of Supreme Court

(A) A motion to certify, a motion for leave to appeal or a claimed appeal as of right shall be supported by a memorandum which shall contain:

(1) The same matters required in a brief on the merits (Rule V, Section 1) except that any argument should be limited to presenting with accuracy, brevity and clarity only what is essential to a ready and adequate understanding of the proposition of law to which it relates and why that proposition should be adopted.

(2) Only to the extent not indicated by such propositions of law and such argument, a concise statement of why the case is of public or great general interest, why a substantial constitutional question is involved or why leave to appeal should be granted, such statement to follow the argument.

(B) The failure of appellant to present with accuracy, brevity and clarity whatever is essential to a ready and adequate understanding of the questions requiring consideration will be sufficient reason for denying the motion to certify or for leave to appeal or for dismissing an appeal as of right on the ground that no substantial constitutional question is involved.

Unless the "statement of the propositions of law presented" clearly states some proposition of law which could serve as a syllabus, the court may dismiss any motion or appeal *sua sponte*.

(C) The body of the brief should be confined to the minimum number of pages necessary to accurately and clearly present the reasons why the case if of public or great general interest or why leave to appeal should be granted or why a substantial constitutional question exists and should seldom exceed thirty pages.

* * * * *

MEMORANDUM IN SUPPORT OF CLAIMED JURISDICTION FILED IN THE SUPREME COURT OF OHIO

(Filed April 12, 1988)

No. 88-669

IN THE SUPREME COURT OF OHIO

SANTOS TORRES, *et al.*,
Plaintiff-Appellant,

v.

J. F. ENTERPRISES, INC.,
Defendant-Appellees.

MEMORANDUM IN SUPPORT OF CLAIMED JURISDICTION OF SUPREME COURT OF PLAINTIFF-APPELLANTS, SANTOS TORRES & ESTHER TORRES

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[Not required: does not exceed 12]

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Proposition Of Law No. 1:

Where a trial court cites for support a certain case of applicable law and that case distinguishes, in its syllabus, an older case of some similarity, it commits reversible error in grounding its decision in the distinguished case, as all lower courts are bound to adhere to principles set forth in syllabus of Supreme Court opinion. (*Smith v. Clem*, 6 Ohio St. 3d 13 approved and followed.)

Proposition Of Law No. 2:

A trial court improperly grants summary judgment where the evidence before it shows that the defendants, to whom summary judgment was granted, by their own evidence showed that a genuine issue of fact existed where one defendant described the defect on the business premises as "square" and another defendant described the defect in the pavement as a "crack", and where the plaintiff described the defect as an "elongated hole", and where the testimony of all three showed no agreement as to the depth of the defect, and where defendant owner was put on notice the previous month before plaintiff's injury that a "fifteen

foot crack in the pavement had settled" in the area near the self-serve gasoline pumps. (*Toledo's Great Eastern Shoppers City, Inc. v. Abde's Black Angus Steak House No. III, Inc.*, 24 Ohio St. 3d 198. approved and followed.)

III. SUBSTANTIAL QUESTION: 11

(A) The trial judge had a personal bias and prejudice against the two Hispanic plaintiffs that prevented the trial judge from exercising his judicial functions impartially, in direct violation of plaintiff's Fourteenth Amendment Due Process and Equal Protection rights.

(B) Judge John J. Connors, Jr., Judge George M. Glasser and Judge Peter M. Handwork are biased against plaintiff's attorney and/or conspired to deprive plaintiffs' attorney of his licensee and constitutional rights to meaningfully practice law before the Sixth District Court of Appeals in violation of his, and his clients' constitutional Due Process and Equal Protection rights. Actions for a violation of plaintiffs' civil rights and their attorney's civil rights are specifically reserved and preserved for the federal courts.

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A—Notice Of Appeal to Supreme Court of Ohio
B—Assignments of Errors to trial court
C—Decision and Entry of Court of Appeals
D—Decision and Entry of trial court

[1] I. STATEMENT OF FACTS

(A) Statement of Case, Proceedings Below:

This civil case involves the self-serve gasoline pumps belonging to defendant J. F. Enterprises, Inc., and the right leg of plaintiff Santos Torres that was broken as he "stepped out of his van ***onto the edge of an elongated hole that defendant J. F. Enterprises and/or defendant Bob Richards negligently maintained in the hard surface near said pumps on the north side", Affidavit of Santos Torres at paragraphs 2, 3, and 4.

On July 14, 1986, Plaintiffs Santos Torres and his wife, Esther, filed their complaint.

On July 21, 1987, the Honorable Gale Williamson, Judge, granted summary judgment to defendants, based upon two affidavits of plaintiffs, one affidavit of defendant Bob Richard and one statement of defendant Greg Shetzer, an employee of J. F. Enterprises.

On July 23, 1987, plaintiffs filed a Notice of Appeal in the Sixth District Court of Appeals.

On March 31, 1988, George M. Glasser, Peter M. Handwork and John J. Connors, Jr., JJ, concurred in a Decision affirming the judgment of Judge Williamson below.

On April 7, 1988, plaintiffs filed a Notice of Appeal to the Supreme Court of Ohio, asserting a substantial constitutional question under the Fourteenth Amendment, and stated that it was of public and great general concern. Plaintiffs' attorney, Walton H. Donnell, asserted a constitutional deprivation against the three reviewing judges.

(B) Statement Of Facts:

At this stage of the appeal (Claimed Jurisdiction), there is no record before this Court to cite to. The trial judge states the [2] facts of the case this way, p. 1 of his Memorandum Decision, see Appendix D attached hereto:

> "FACTS: On September 6, 1985, plaintiff Santos Torres, drove his van to the gas station owned by defendant J. F. Enterprises, Inc. As he exited the van to operate defendants' self-service gas pumps, Mr. Torres stepped into what he describes as an elongated hole in the surface of the pump area and tripped injuring his right foot and knee. Employees of the station, defendants Greg Shetzer and Kathy Rose, situated approximately forty feet away did not observe Mr. Torres stepping in the hole but Mrs. Torres reported the incident to defendants Shetzer and Rose. Mr. Torres asserts the injury occurred at an island on the north side of the premises.
>
> "On September 9, an employee of the station showed Mr. Richard a depression in the pavement where the pump island met the surrounding paved surface. The employee believed that this was where Mr. Torres had tripped. Mr. Richard observed that the depression was approximately two feet square and less than one inch deep.
>
> "In August of 1985, there existed another defect in the pavement around the northern pumps island. This consisted of crack approximately fifteen feet long and of unknown depth where the pavement had settled. In August the contractor agreed to repair this crack and a repavement of the pump area was finished sometime in September of 1985. Mr. Torres is unable to give a size description of the hole where he was injured and has returned to the site of the injury only to find that the entire area is smooth, without depressions of any kind. The defendant, Gregory Shetzer examined the crack and found there to be an elevation difference of about 1 1/2 inches at the crack." (Trial court decision, p. 1, Appendix D attached.)

II. ARGUMENT

(A) Propositions of Law, with authorities as they appear:

Proposition Of Law No. 1:

Where a trial court cites for support a certain case of applicable law and that case distinguishes, in its syllabus, an older case of some similarity, it commits reversible error in grounding its decision in the distinguished case, as all lower courts are bound to adhere to principles set forth in syllabus of Supreme Court opinion. (*Smith v. Clem*, 6 Ohio St. 3d 13 approved and followed.)

Authorities In Support:

1. *Smith v. Clem* (1983), 6 Ohio St. 3d 13 3,5
2. *Cash v. Cincinnati* (1981), 66 Ohio St. 2d 319 4,5,6,7,8,9,10
3. *Helms v. American Legion, Inc.* (1966), 5 Ohio St. 2d 60 5,6,7,8,9,10
4. *Kimball v. Cincinnati* (1953), 160 Ohio St. 370 4,5,7
5. *Smith, Adm. v. United Properties, Inc.* (1965), 2 Ohio St.2d 310 5,6,7
6. *Schilliger v. Graceland Shoppers Mart* (1965), 2 Ohio St. 2d 310 5,6,7

[3] *Proposition Of Law No. 2:*

A trial court improperly grants summary judgment where the evidence before it shows that the defendants, to whom summary judgment was granted, by their own evidence showed that a genuine issue of fact existed where one defendant described the defect on the business premises as "square" and another defendant described the defect in the pavement as a "crack", and where the plaintiff described the defect as "an elongated hole", and where the testimony of all three showed no

agreement as to the depth of the defect, and where defendant owner was put on notice the previous month before plaintiff's injury that a "fifteen foot crack in the pavement had settled" in the area near the self-serve gasoline pumps. (*Toledo's Great Eastern Shoppers City, Inc. v. Abde's Black Angus Steak House No. III,* 24 Ohio St. 3d 198, approved and followed.)

Authorities In Support:

7. Rule 56: Summary Judgment.
8. *Toledo's Great Eastern Shoppers City Inc. v. Abde's Black Angus Steak House No. III, Inc.* (1986), 24 Ohio St.3d 198 7,8

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10. *McCabe's v. La-Z-Boy Furniture, Inc.*, 798 F. 2d 323 (1986) 12
11. *King & Co. v. Horton* (1924), 116 Ohio St. 205 12

(B) Legal Argument:

Proposition Of Law No. 1:

Where a trial court cites for support a certain case of applicable law and that case distinguishes, in its syllabus, an older case of some similarity, it commits reversible error in grounding its decision in the distinguished case, as all lower courts are bound to adhere to principles set forth in syllabus of Supreme Court opinion. (*Smith v. Clem*, 6 Ohio St. 3d 13, approved and followed.)

Smith v. Clem is right out of the Sixth District Court, as is this appeal. The trial court cited seven cases for support of its summary judgment:

(1) *Cash v. Cincinnati* (1981), 66 Ohio St. 2d 319;

(2) *Helms v. American Legion, Inc.* (1966), 5 Ohio St. 2d 60;

(3) *Kimball v. Cincinnati* (1953), 160 Ohio St. 370,

plus four of *Kimball's* progeny, all 1959 cases and all slabs-of-concrete sidewalk cases in municipalities.

The most recent case cited by the trial court was *Cash*, a 1981 case that distinguished, in its syllabus, 1953 *Kimball, supra*, as follows:

[4] "1. Reasonable minds could differ as to whether a 12 to 14 inch wide, one and one-half inch deep, excavation extending into the width of a crosswalk in a heavily pedestrian-traveled downtown section of the city was so substantial that such defect rendered the crosswalk unsafe for travel in the usual and ordinary mode. (*Kimball v. Cincinnati*, 160 Ohio St. 370 distinguished.)

"2. In such a case when reasonable minds might differ as to whether a defect in a crosswalk is so trivial as to relieve liability, a trial court properly leaves that issue to the jury, and all the attendant circumstances must be considered in determining whether such a crosswalk is reasonably safe for use by pedestrians." (Supreme Court in *Cash, supra*, syllabus 1 and 2, *distinguishing Kimball v. Cincinnati.*)

Yet Judge Williamson grounded his decision in *Kimball*, not *Cash*. And 1981 *Cash* distinguished *Kimball* in its syllabus.

And the difference between *Cash* and *Kimball* is substantial and critical, in applying the law to the facts of the case *sub judice:* The old slab-of-a-sidewalk case,

1953 *Kimball*, and its progeny through 1959, held that a defect less than two (2) inches deep was a minor imperfection as a matter of law and not actionable: contrasted to this, 1981 *Cash* held that a hole or defect "one and one-half inch deep" [and] 12 to 14 inch wide" should be submitted "to the jury" to determine whether such a defect "is so trivial as to relieve liability", syllabus of *Cash*.

The hole or defect in the case *sub judice*, by the defendant's own testimony, was the same depth, "one and one-half inch deep" and larger in area than the hole in *Cash* (see findings of fact by the trial court at p. 2 of its Decision, Appendix D attached: defendant Bob Richard said the depression was "two feet square" and "defendant Gregory Shetzer examined the crack and found there to be an elevation difference of about 1 1/2 inches at the crack."

Yet Judge Williamson, with his judicial lap holding a defect larger than the defect that had to go to the jury in *Cash*, as a matter of law, granted summary judgment, taking away plaintiffs' right to a jury trial on the merits. The Ohio law applicable to the facts was 100% against Judge Williamson's summary judgment decision, yet [5] Judge Williamson granted summary judgment, grounding his decision in the "Kimball decision" (Decision, p. 3), even though the syllabus of *Cash* distinguished *Kimball*, *supra*, and Judge Williamson was bound by the syllabus law in *Cash*, for this Court stated in *Smith v. Clem* (1983), 6 Ohio St. 3d 16, 450 NE 2d 1171:

> "All lower courts bound to adhere to principles set forth in syllabus of Supreme Court opinion." (*Syllabus of Smith v. Clem*, which came up from N'western Ohio, Sixth District Court of Appeals, same as case *sub judice*.)

In citing *Cash, supra,* for support, the trial judge was bound by the syllabus law of that case, which distinguished *Kimball,* yet used *Kimball* to ground its decision in:

> "Although, as admitted by defendants in their motion, there does not appear to be any reported Ohio decisions dealing with imperfections in filling station driveways or other areas traversed by both pedestrians and motorists, the basic rationale of the *Kimball* decision seems applicable to the case at bar." (Judge Williamson Decision, pp. 2, 3.)

The foregoing are reasons why this court should adopt Proposition Of Law No. 1: Judge Williamson was bound to "adhere to the principles set forth in syllabus of Supreme Court opinion", *Smith v. Clem, supra;* Judge Williamson cited for support the 1981 case of *Cash v. Cincinnati; Cash* distinguished *Kimball* in its syllabus, yet Judge Williamson grounded his decision in *Kimball,* a slab-of-concrete-sidewalk case from 1953. *Cash* supports the relevant facts in favor of plaintiffs, and Judge Williamson should have allowed the facts to be submitted to a jury, rather than grant summary judgment against them.

The syllabus of *Helms, supra,* supports plaintiffs on the facts, and the *Helm's* syllabus overruled two cases (*Smith, Admr.* and *Schilliger, supra,* "except the syllabus thereof". Judge Williamson never once referred to this part of the syllabus in *Helm,* nor did Judge Williamson refer to, discuss, or cite the syllabus of *Smith, Admr.* and *Schilliger* which the Supreme Court retained as Ohio law, [6] and which syllabus speaks to "attendant circumstances", e.g., obstructed vision.

And the reviewing judges' Decision, p. 3, incorrectly states:

> "None of the distractions in *Cash* are present in this case. Appellants do not allege poor visibility or *obstructed vision.*" (Emphasis added.)

Appellants do not allege*** obstructed vision? Once again, this is another lie[1] by the Sixth District Court judges. The obstructed vision of plaintiff Santos Torres to, see the hole as he stepped from his van at defendant's self-serve gasoline pumps, was brought to the attention of the Court of Appeals in appellants' brief to that court:

Mr. Torres on cross by attorney Joseph Dawson (Deposition, pp. 24, 25):

> "Q. All right. You open the door, you go to get out, and you step down from the van, and it's as you step down, you hit this depression, and hear or you feel something break?
>
> "A. I open the door, *but I couldn't see nothing, because that thing is right along the edge. I couldn't see if, you know, if there was a hole or what,* because—
>
> "Q. You didn't look?
>
> "A. Which—
>
> "Q. You didn't look when you stepped down?
>
> "A. *I looked,* but I didn't see the edge of that step, and when I stepped down, I stepped right on the edge of it, and that's what cracked me, not because I put the weight on where the hole was." (Santos Torres Deposition, pp. 24, 25, emphasis added to show that view was obstructed.)

This obstructed vision of plaintiff Santos Torres is one of the "attendant circumstances" to which the syllabus of

---

[1] Allegations of a plaintiff can be contained in a Deposition of the plaintiff as well as in the complaint of a plaintiff. Glasser, Handwork and Connors, Jr., JJ, clearly lied when they stated in their decision, p. 3, that "[a]ppellants do not allege poor visibility or obstructed vision", and another lie when the reviewing judges state in their decision, p. 4, that "[a]ppellants argue that the trial court abused its discretion by failing to consider all attendant circumstances before granting appellee's summary judgment motion." In another case filed today in this Court, attorney Donnell pointed out that Glasser, Handwork and Resnick, JJ, lied twice about "testimony" in the record in that case also.

Smith, Admr. and *Schilliger* spoke to, and whose syllabus was retained (not overruled) by this Court in *Helms*:

> "All the attendant circumstances must be considered in order to determine whether a sidewalk in a shopping center is reasonably safe for the use of invitees and such determination does not depend solely upon the matter of variation in the height of adjacent blocks [of concrete] in such sidewalk." (Third paragraph of syllabus of *Smith, Admr. and Schilliger cases,* made a part of the syllabus in *Helms.*)

[7] And at p. 63, *Helms, supra,* this Court observed:

> "We do not disturb the syllabus [of *Smith, Admr.* and *Schilliger*] because we recognize that there may be instances of defective surfaces used by *pedestrians or vehicles* to which that syllabus could well be applicable." (Emphasis added.)

Proposition Of Law No. 2:

A trial court improperly grants summary judgment where the evidence before it shows that the defendants, to whom summary judgment was granted, by their own evidence showed that a genuine issue of fact existed where one defendant described the defect on the business premises as "square" and another defendant described the defect in the pavement as a "crack", and where the plaintiff described the defect as "an elongated hole", and where the testimony of all three showed no agreement as to the depth of the defect, and where defendant owner was put on notice the previous month before plaintiff's injury that a "fifteen foot crack in the pavement had settled" in the area near the self-serve gasoline pumps. (*Toledo's Great Eastern Shoppers City, Inc. v. Abde's Black Angus Steak House No. III,* 24 Ohio St. 3d 198, approved and followed.)

Rule 56 has three conjunctive prongs: a trial court cannot grant summary judgment unless the evidence shows:

(1) "That there is no genuine issue as to any material fact;

(2) "That the moving party is entitled to judgment as a matter of law;

(3) "The party against whom the motion for summary judgment is made [is] entitled to have the evidence or stipulation construed most strongly in his favor." [Rule 56(C)].

PRONG 2: Discussed under Proposition Of Law No. 1, *supra*, Ohio law dis-entitles defendants to summary judgment, *Cash* and *Helms, supra.* And it only takes one of the connecting prongs to defeat defendant's motion for summary judgment (Prong 2). But there's more.

PRONG 1: Both courts below did not reach the factual issue presented by the defendants by their own evidence, and the plaintiff's evidence, showing the existence of a "genuine issue as to [a] material fact". (Prong 1.)

Upon which "depression" or "crack" or "hole" did the trial court apply the "two-inch doctrine" of *Kimball, supra,* in granting summary judgment to the defendants? Was it the "two fee *square* and less than *one inch deep depression*" of defendant Bob Richard? (Richard Affidavit, paragraph 8, emphasis added.)

[8] Or was it the "crack" about "1 ½ inches" deep that defendant Gregory Shetzer "examined"? (Trial court's facts, Decision, p.2.)

Or was it the "*elongated hole*" described by plaintiff Santos Torres who was "unable to give a size description of the hole for the reason that at a later date [I] went back upon the premises with the intent to measure the *elongated hole* but found the surface then to be smooth and without *depressions* of any kind." (Affidavit of Santos Torres, paragraphs 3, 5, emphasis added, showing the defect to be "an elongated hole", and, further, that there was more than one depression by the gas pumps.)

Not one of the defendants or the plaintiff could agree upon which depression or crack or hole, or what shape, or what depth, or where the defect was that plaintiff actually "stepped onto" as he "stepped out of his van", yet Judge Williamson apparently could[2] from the conflicting evidence, as he granted summary judgment to defendants who conflicted among themselves, showing a genuine issue of fact, even without plaintiff's testimony, *Toledo's Great Eastern Shoppers City* (right out of the Sixth District), *supra.*

And the evidence before Judge Williamson clearly showed that not one of the defendants had any first hand knowledge as to where the defect was that plaintiff actually stepped onto on September 6, 1985:

> "That [Esther Torres] immediately went to [Kathy Rose and Greg Shetzer] and asked them to help her husband some thirty or forty feet away, and said

[2] This is incomprehensible to plaintiff's attorney, that an Ohio judge granted summary judgment with such conflicting evidence which showed a genuine issue of a material fact: which defect was it and how deep was it? And with "attendant circumstances" of *Helms* present (obstructed vision of Santos Torres), and with Judge Williamson's judicial lap filled with a defect (by defendants' own testimony) larger than the defect, and just as deep as, the defect in *Cash*, which the Supreme Court sent (ordered sent) to the jury in *Cash*. Biased against Mexicans as plaintiffs assert (Fourth Assignment Of Error)? And the Sixth District Court sustained the summary judgment! Bias or a conspiracy?

> employees did not give assistance or even walk over to her injured husband." (Affidavit of Esther Torres, paragraph 4.)

[9] Was the trial judge aware, or should have been aware, of the genuine issue of this material fact? Attorney Donnell, in his "MOTION OF PLAINTIFFS TO DENY MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT" (emphasis in original) stated in these plain words:

> "Issue Of Facts No. 1: IN WHICH DEPRESSION WAS PLAINTIFF INJURED? Plaintiffs ask this Court to look at the three affidavits of the parties ***."
>
> "And look at the factual issue, as to which depression plaintiff was injured in, created by the conflicting descriptions of the depression given by the parties: plaintiff Santos Torres swears that the depression was 'an elongated hole'; defendant Robert Richard swears that 'the depression had the approximate dimensions of being two feet *square*'—not two square feet. Clearly, there is a factual issue as to which depression it was—'elongated' or 'square'." (Donnell Motion opposing summary judgment, pp. 3, 4; filed in trial court June 22, 1987, all emphasis in excerpt in original.)

No doubt about it, Judge Williamson had the notice of this genuine issue of fact before him when he considered, and granted, summary judgment to defendants, by his own acknowledgment:

> "The Court has before it *** plaintiff's (sic) motion to deny defendants' motion with supporting memorandum (to which are attached the affidavits of Santos and Esther Torres). (Williamson Memorandum Decision, p. 1, all parentheses in original except those around the word, sic.)

And it can be fairly said that the three judges on the Sixth District Court of Appeals knew—not should have known but actually knew—the existence of the conflicting evidence showing this genuine issue of fact: not only was Mr. Donnell's Memorandum and Motion opposing summary judgment a part of the record sent up to that Court, but the three judges (Glasser, Handwork, and Connors, Jr., JJ) actually acknowledged[3] in their concurring Decision, p. 1, that:

> "Mr. Torres stepped onto what has been described in varying ways by the parties as an 'elongated hole', a 'crack' and a 'depression'."

[10] Glasser, Handwork and Connors, Jr., JJ, acknowledge in their Decision that they were aware of the three conflicting descriptions of a "hole", a "crack", and a "depression" and acknowledged that defendants did not, from the evidence in the record, have first hand knowledge of where the defect was located, and showed an awareness of the applicable Ohio law when they cited, for support, *Cash* and *Helms, supra*, yet they unanimously concurred in affirming the trial court, granting summary judgment to defendants, against Mr. Donnell's plaintiff clients. Why—even going so far as to lie two times about what appellants (plaintiffs) did, (Decision, pp. 3, 4) discussed *supra* at p. 6. Why?

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[3] It is disturbing to attorney Donnell that three experienced, grown judges on an Ohio Court of Appeals could acknowledge this conflicting evidence of the parties, and further acknowledge (same page of their concurring decision) that "[a]ppellees Shetzer and Rose were approximately forty feet away from the van and did not observe appellant's fall"—acknowledge these facts in the record showing a genuine issue of fact, and still affirm the deficient judgment below. With both here [the issue of fact and Ohio law (*Cash* and *Helms, supra*)] being 100% against summary judgment, how could these judges affirm below. Bias? Conspiracy?

And just 20 days before, Judge Glasser and Judge Handwork participated in another (filed this date in this Court) case—a case in which, once again, Ohio law applicable to the facts of the case, supported attorney Donnell's client (the defendant there) 100%, yet Glasser and Handwork, JJ. (and concurred in by Resnick, P.J.) affirmed the trial court. Why? And in that case 20 days before the Sixth District Court's decision in the case *sub judice*, Glasser, Handwork and Resnick, JJ and PJ respectively, inaccurately stated (by direct lies) what "appellee testified" to and what "appellant testified" to. Why?

Attorney Donnell believes, and alleges, that the four judges of the present Sixth District Court of Appeal are biased against Mr. Donnell and/or conspired[4] to deprive Mr. Donnell of his licensee and constitutional rights to meaningfully practice law before that Court, which brings us to a substantial constitutional question:

[11] III. SUBSTANTIAL CONSTITUTIONAL QUESTION:

(A) The trial judge had a personal bias and prejudice against the two Hispanic plaintiffs that prevented the trial judge from exercising his judicial functions impartially, in direct violation of plaintiffs' Fourteenth Amendment Due Process and Equal Protection rights.

---

[4] The conspiracy by Ohio judges against attorney Donnell extends from Sixth to the Third District Court at Lima and the Honorable Kenneth A. Rohrs, Judge of Henry County, Mr. Donnell believes and alleges, and began on or about the week of August 10, 1987 at the Judges Conference held in Northwestern Ohio at Toledo. In that Henry County case, applicable law (and cited by Judge Rohrs for support) actually supported Mr. Donnell's clients 100% (here, also, clients were Mexican), yet Judge Rohrs granted summary judgment.

Glasser, Handwork and Connors, Jr., JJ, stated (Decision, pp. 6, 7):

> "It is unnecessary to reach this assignment of error as presented by appellants. *** The proper disqualification procedure is enumerated in R.C. 2701.03. This section requires an affidavit be filed 'setting forth the fact of the interest, bias, prejudice, or disqualification.'
>
> "Therefore, in light of R.C. 2701.03, we need not decide the constitutional issues by appellants."

How could appellants (plaintiffs below) file a disqualification affidavit against Judge Williamson "not less than three days prior to the time set for the hearing in the matter or cause", when plaintiffs did not know of Judge Williamson's alleged bias against Mexicans until after Judge Williamson ruled against them via a summary judgment for defendants? Shocked, they asked their attorney what happened (even their daughter was shocked). Mr. Donnell told them the summary judgment was not supported by Ohio law, and asked them if either of them ever had a run in with the Judge before? When they answered no, Mr. Donnell advised them to check with their friends who knew Judge Williamson, and see what they could find out. One person (a Mexican also) stated, on August 10, 1987, that Judge Williamson, without any reason to that he knew of, told him in court, "you're a disgrace to society."

In any event, Mr. Donnell told plaintiffs that, should the state courts refuse to "reach this assignment of error", he would do his best to see that a federal court[5] would.

[5] Mr. Donnell explained to his clients the appellate process up through the state courts, and to the U. S. Supreme Court in the event a federal question was involved. In bias and/or conspiracy cases, once a plaintiff gets by the usual Rule 12 motions to dismiss, a federal district court allows formal discovery to plaintiffs from defendant state officials, so that circumstantial evidence can be flushed out with documents, phone calls, etc. from defendants.

[12] Judge John J. Connors, Jr., Judge George M. Glasser and Judge Peter M. Handwork are biased against plaintiffs' attorney and/or conspired to deprive plaintiffs' attorney of his licensee and constitutional rights to meaningfully practice law before the Sixth District Court of Appeals in violation of his, and his clients' Due Process and Equal Protection rights. Actions for a violation of plaintiffs' civil rights and their attorney's civil rights are specifically reserved and preserved for the federal courts.

As discussed *supra*, and in the other case filed today in this Court, most of Mr. Donnell's evidence is circumstantial[6] against the several appellate and common pleas judges from Lucas, Wood and Henry Counties (Sixth and Third Districts[7]). But federal courts agree:

> "Conspiracies are rarely evidenced by explicit agreements, and therefore may be proved by circumstantial evidence and the reasonable inferences that may be drawn therefrom." (*McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F. 2d 323, 328 (1986).

STATEMENT WHY CAUSE IS OF PUBLIC OR GREAT GENERAL CONCERN:

This Court stated in *King & Co. v. Horton* (1924), 116 Ohio St. 205:

> "[A judge's] chief function is to prevent injustice being done between the parties, and, as a corollary thereto, to see that justice is actually administered." (*King*, at p. 211.)

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[6] Circumstantial evidence is insufficient for state disciplinary proceedings.

[7] The Third District Court at Lima has not ruled on Mr. Donnell's Henry County case, adversely or otherwise. It just waits, doing nothing apparently, for, as of Saturday, April 9, 1988, Mr. Donnell still has not received a hearing date from that Court, yet Donnell filed the appeal 8-26-87; the Record was sent up 9-25-87; defendants' attorney requested oral argument 12-31-87. Is delay justice?

Substantial justice was not done, not by the trial judge, not by the reviewing judges. This is of great general concern, especially in light of investigations of the Illinois Judiciary and the Texas Judiciary for corruption and court decisions that appear to go in the direction from where the judge's political contributions come.

CONCLUSION:

For the above reasons, this Court should take jurisdiction.

Respectively submitted,

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[13] APPENDIX "A"

FILED
WOOD COUNTY, OHIO
COURT OF APPEALS
(APR 7 1988)

IN THE COURT OF APPEALS
OF WOOD COUNTY, OHIO

SANTOS TORRES, *et al.*,
Plaintiffs-Appellants,

v.

J. F. ENTERPRISES, INC.,
Defendants-Appellees.

NOTICE OF APPEAL TO SUPREME COURT OF OHIO

NOTICE is hereby given that plaintiffs Santos Torres and Esther Torres hereby appeal to the Supreme Court of Ohio from the judgment entered in this action by the Court of Appeals for the Sixth District on March 31, 1988.

The case involves a substantial constitutional question under the Fourteenth Amendment of the Constitution, and is of public and great general concern.

/s/ WALTON H. DONNELL
742 Otsego Pike, P.O. Box 733
Bowling Green, OH 43402
Telephone: (419) 278-2483
Att'y Reg. No.: 0020371

CERTIFICATION:

A copy of the foregoing Notice Of Appeal To Supreme Court was served upon attorney Joseph P. Dawson by ordinary mail, postage prepaid, at 632 Spitzer Bldg, Toledo, OH 43604 April 7, 1988.

/s/ WALTON H. DONNELL

[14] APPENDIX "B"

I. STATEMENT OF ASSIGNMENT OF ERRORS 1

1. *First Assignment Of Error:* Trial court erred in granting the motion of defendants for summary judgment for the reason that its judgment is contrary to law.

   A. Contrary to the syllabus of law in *Cash v. Cincinnati* (1981), 66 Ohio St. 2d 319 2-5

   B. Contrary to the syllabus of law in *Helms v. American Legion, Inc.* (1966), 5 Ohio St. 2d 60; (1) Trial judge usurped power of Supreme Court 6-9

2. *Second Assignment Of Errors:* The trial court erred in granting the motion of defendants for summary judgment for the reason that the trial judge violated Ohio Rule Of Evidence 602 [Lack Of Personal Knowledge], to the prejudice of plaintiffs 9-11

3. *Third Assignment Of Errors:* The trial court unconstitutionally applied Ohio Rule Of Evidence 407 [Subsequent Remedial Measures], to prejudice of plaintiffs 11-14

4. *Fourth Assignment Of Errors:* The trial court judge had a personal bias and prejudice against the two Hispanic plaintiffs to the extent that it prevented the trial judge from exercising his judicial functions impartially in plaintiffs' case, in direct violation of plaintiffs' Fourteenth Amendment Due Process and Equal Protection rights 14-15

[15] APPENDIX "C"

No. WD-87.

COURT OF APPEALS OF OHIO,
SIXTH DISTRICT
COUNTY OF WOOD

(Filed March 31, 1988)

SANTOS TORRES and ESTHER TORRES,
Appellants,

vs.

J. F. ENTERPRISES, INC., *et al.*,
Appellees.

DECISION AND JOURNAL ENTRY

This cause is on appeal from a judgment of the Wood County Court of Common Pleas.

The events which gave rise to this action are essentially uncontroverted. On September 6, 1985, at approximately 6:00 a.m., plaintiff-appellant, Santos Torres, drove his van to a gas station owned by defendant-appellee J. F. Enterprises, Inc. Santos Torres was accompanied by his wife Esther Torres who joins him in this appeal.

Upon arriving at the gas station, appellants parked their van near the northwest set of gasoline pumps. As he was exiting his van, Mr. Torres stepped onto what has been described in varying ways by the parties as an "elongated hole," a "crack" and a "depression." Appellant's right foot stepped on the edge of this

depressed area as he descended from his van. In exiting the van, appellant fell, injuring his right foot and knee. Appellant Esther Torres witnessed the incident and reported it to defendant-appellees Greg Shetzer and Kathy Rose, employees working at the station. Appellees Shetzer and Rose were approximately forty feet away from the van and did not observe appellant's fall.

[16] In their original cause of action, appellants alleged that appellee J. F. Enterprises, Inc., negligently maintained the area around the gas pumps so as to cause injury to the appellant.

On June 8, 1987, appellee J. F. Enterprises, Inc., moved for summary judgment as to any issue regarding negligence. In support of the motion for summary judgment appellee alleged that because appellants were business invitees the standard of care owed them is one of ordinary care to prevent reasonably foreseeable accidents and injuries. *S.S. Kresge Co. v. Fader* (1927), 116 Ohio St. 718. Appellees also urged that they did not have a sufficient period of notice to either correct the depression or warn of its presence. *S.S. Kresge Co., supra.* The court granted summary judgment in favor of appellees.

From said judgment, appellants set out the following four assignments of error:

> "1. Trial court erred in granting the motion of defendants for summary judgment for the reason that its judgment is contrary to law.
>
> "2. The trial court erred in granting the motion of defendants for summary judgment for the reason that the trial judge violated Ohio Rule of Evidence 602 [Lack Of Personal Knowledge], to the prejudice of plaintiffs.

"3. The trial court unconstitutionally applied Ohio Rule of Evidence 407 [Subsequent Remedial Measures] to the prejudice of plaintiffs.

"4. The trial court judge had a personal bias and prejudice against the two Hispanic plaintiffs to the extent that it prevented the trial judge from exercising his judicial functions impartially in plaintiffs' case, in direct violation of plaintiffs' Fourteenth Amendment Due Process and Equal Protection rights."

In their first assignment of error, appellants contend that in granting summary judgment, the trial court's decision was contrary to law as announced by the Ohio Supreme Court in *Cash* v. *Cincinnati* [17] (1981), 66 Ohio St. 2d 319, and *Helms v. American Legion, Inc.* (1966), 5 Ohio St. 2d 60.

In *Cash*, the court held that it was for the jury to determine whether the defendant was negligent in allowing a depression in a crosswalk approximately twelve to fourteen inches wide and one and one-half inches deep to remain unrepaired. However, the court clearly differentiated its holding in *Cash* from other similar cases. In *Cash*, the court noted, circumstances surrounding the depression existed that did not render such a "defect insubstantial as a matter of law." Such circumstances in *Cash* included a busy downtown intersection, poor visibility and surrounding vehicular traffic. None of the distractions referred to in *Cash* are present in this case. Appellants do not allege poor visibility or obstructed vision.

Appellants would have the court focus much of its attention on the size of the depression. Appellants contend that because the overall dimensions of the depression were larger than *Cash* that its potential for peril was an issue for the jury. Much of this argument is

misplaced. The overall dimensions of the depression are relatively unimportant because appellant's fall occurred as he attempted to place his weight on the *edge* of the depression. This indicates that the focus should be on the *disparity* in elevation rather than expanse of the depression.

Appellants provide no evidence as to the depth of the depression. Conversely, appellees present two affidavits indicating the depth to be anywhere from "less than one inch" (affidavit of Robert Richard) to "one and one-half inches" (answer of Greg Shetzer). Construing the evidence most strongly in favor of appellants (Civ. R. 56(C)), a depression with a depth of one and one-half inches is not so dangerous as to create a question for the jury as a matter of law. [18] *Kimball v. Cincinnati* (1953), 160 Ohio St. 370. In what has been referred to as the "two-inch doctrine," see *Gallagher v. Toledo* (1959), 168 Ohio St. 508; *Buckley v. Portsmouth* (1959), 168 Ohio St. 513; *Kindle v. Akron* (1959), 169 Ohio St. 373, the *Kimball* court held that a "slight defect" did not create a question of fact for the jury as a matter of law. The holding in *Kimball* was extended to owners and occupiers of private premises in *Helms v. American Legion, Inc., supra.*

Appellants assert that the trial court "usurped the power of the Supreme Court" in applying *Helms* to the case *sub judice.* Appellants argue that the trial court abused its discretion by failing to consider all attendant circumstances before granting appellees' summary judgment motion. This argument is also without merit.

> "The trial court's judgment [will not] be disturbed on appeal absent a showing that the trial court abused its discretion (citations omitted). *** The term 'abuse of discretion' connotes more than an

> error or law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore* v. *Blakemore* (1983), 5 Ohio St. 3d 217 (citations omitted).

As observed by the trial court, appellants failed to personally obtain the measurement of the depression, choosing instead to rely on appellees' affidavits. Appellants also failed to present evidence of unique circumstances to distinguish their cause of action from *Helms* and make summary judgment an inappropriate disposition. Therefore, the trial court's attention was properly directed to the difference in elevation noted in each case and their adherence to *Kimball*, making each cited case applicable to the case *sub judice*.

Summary judgment is properly "granted when it appears from the evidence submitted that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made ***." *Adkins v. Ontario* (1983), 8 [19] Ohio St. 3d 45. Appellants have failed to adduce, nor will they be able to do so, enough evidence to address these issues at trial.

For all of the aforestated reasons, appellants' first assignment of error is found not well-taken.

Appellants' second assignment of error concerns the trial court's application of Ohio Evid. R. 602. Evid. R. 602 provides in part that:

> "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself."

Appellants claim that appellee Robert Richard did not know where the incident took place and, therefore, did not have the requisite personal knowledge necessary for acceptable testimony regarding the size and depth of the depression.

In his affidavit Richard stated that he learned of the location of the depression from appellee Kathy Rose. According to the testimony of Mrs. Torres, Rose was advised as to the location of the incident immediately after it happened. Accordingly, Rose acquired personal knowledge as to where the incident occurred. Rose subsequently and without any indication of uncertainty or hesitation, led Richard to the site, thereby allowing *him* to obtain personal knowledge regarding the location of the depression.

Accordingly, the trial court did not err in its application of Ohio Evid. R. 602. The affidavit of Robert Richard was properly admitted as evidence of the depth of the depression.

For the aforestated reason, appellants' second assignment of error is not well-taken.

[20] In their third assignment of error, appellants contend that the trial court misapplied Ohio Evid. R. 407 to the prejudice of the appellants. Evid. R. 407 provides:

> "When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose ***."

Appellants contend that because appellees made repairs to the area in question a short time after the incident, appellants were prevented from measuring the

depression. Noting that summary judgment was granted in part on the basis of the trial court's conclusion that appellants failed to obtain their own measurement, nor would they be able to because of subsequent repairs to the area, appellants assert that Evid. R. 407 was violated. Appellants argue that in considering the repairs, the trial court breached Evid. R. 407. Appellants' claim is unfounded.

In addition to the fact that no reference to Evid. R. 407 is made in the decision below, the second sentence of Evid. R. 407 "does not require the exclusion of evidence of subsequent measures when [the evidence is] offered for another purpose ***." In this case, the "other purpose" was to establish that appellants would be precluded from gathering further evidence at the site of the incident. There is nothing in the record to indicate that inclusion for this purpose was improper or prejudicial to appellants.

Appellants also dwell on the trial court's alleged failure to provide additional time for them to personally ascertain the dimensions of the hole. This claim is also contrary to evidence and without merit.

[21] During the time between when appellants were made aware of the identity of the contractor conducting the repairs to appellees' premises and the day the motion for summary judgment was filed, appellants made no attempt to depose the contractor regarding the size of the hole. Appellants' failure to obtain timely the eyewitness testimony of the contractor considered in addition to the repairs, made it proper for the trial court to conclude that appellants would fail to produce additional evidence regarding the dimensions of the hole at trial. Therefore, it was proper for the trial court to rely solely on the statements of appellees Robert Richard and Greg Shetzer concerning the size of the depression.

A party opposing a motion for summary judgment,

> "[M]ust establish, by specific facts, that there is a genuine issue for trial in order to avoid summary judgment (citation omitted). Unsupported allegations in opposition to a motion for summary judgment are insufficient to require denial of the motion." *Albritton* v. *Neighborhood Centers Assn.* (1984), 12 Ohio St. 3d 210 (citations omitted).

For all of the aforestated reasons, appellants' third assignment of error is not well-taken.

In their fourth assignment of error, appellants contend that the trial judge had a personal bias against the Hispanic heritage of appellants so as to deprive them of their constitutional rights of Due Process and Equal Protection.

It is unnecessary to reach this assignment of error as presented by appellants. Assuming appellants are suggesting the trial judge should have removed himself from the instant case, appropriate procedure dictates that:

> "[a]uthority to pass upon the disqualification of a judge of the Court of Common Pleas is vested in the [Ohio] Chief Justice under section 5(C) of Article IV of the Ohio Constitution ***." *Beer* v. *Griffith* (1978), 54 Ohio St. 2d 440.

[22] The proper disqualification procedure is enumerated in R.C. 2701.03. This section requires an affidavit be filed "setting forth the fact of the interest, bias, prejudice, or disqualification." The affidavit must be filed "not less than three days prior to the time set for the hearing in the matter or cause." R.C. 2701.03.

> "Since only the Chief Justice or his designee may hear disqualification matters, the Court of Appeals [is] without authority to pass upon the disqualification or to void the judgment of the trial court upon that basis." *Beer, supra.*

Therefore, in light of R.C. 2701.03, we need not decide the constitutional issues raised by appellants. Courts will avoid constitutional questions when nonconstitutional rulings are dispositive. *Greenhills Home Owners Corp. v. Village of Greenhills* (1966), 5 Ohio St. 2d 207, paragraph one of the syllabus.

For the aforestated reason, appellants' fourth assignment of error is not well-taken.

More than a mere cautionary statement, however, is directed to appellants. It should be noted that "there is a presumption of the trial judge's impartiality," *State v. Browning* (1967), 9 Ohio Misc. 228, which must be overcome by the party requesting disqualification.

> "In the absence of some showing to the contrary, there is a presumption that the trial judge performed his duty and did not rely upon anything in reaching his decision that he should not have relied upon." *City of Columbus* v. *Guthmann* (1963), 175 Ohio St. 282.
>
> Additionally,
>
> "it is well-recognized in trial court circles that the mere filing of an affidavit often intensifies the feeling of the judge against the person who originates it. Such a charge is not complimentary, is felt by the recipient to be derogatory and generally reflects on the strength of the character of the trial judge." *State* v. *Browning, supra.*

[23] A review of the record fails to reveal any indication of partiality and prejudice on the part of the trial judge. Such suggestions and allegations by counsel should only be set forth where a reasonable and well-founded basis for such serious accusations is present.

On consideration whereof, the court finds substantial justice has been done the party complaining, and the judgment of the Wood County Court of Common Pleas is affirmed. Appellants are ordered to pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

JOHN J. CONNORS, JR., *J.*
PETER M. HANDWORK, *J.*
GEORGE M. GLASSER, *J.*
Concur.

[24] APPENDIX "D"

IN THE COURT OF COMMON PLEAS
OF WOOD COUNTY, OHIO

Case No. 86-CIV-255

SANTOS TORRES, *et al.*,
Plaintiffs,

vs.

J. F. ENTERPRISES, INC., *et al.*,
Defendants.

ORDER AND JUDGMENT ENTRY GRANTING
MOTION FOR SUMMARY JUDGMENT

This cause came before this Court on the motion of the defendants requesting summary judgment against plaintiffs' on their complaint.

Oral arguments having been waived or found unnecessary, the Court reviewed all pleadings, affidavits and memoranda which have been filed in this cause.

The Court on due consideration finds the motion well taken and that it should be granted for the reasons set forth in the Memorandum Decision attached.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment is granted. This case is therefore dismissed with prejudice at the plaintiffs' costs.

/s/ GALE WILLIAMSON
Judge

[25] IN THE COURT OF COMMON PLEAS
OF WOOD COUNTY

Case No. 86-CIV-255

SANTOS TORRES, *et al.*,
Plaintiffs,

vs.

J. F. ENTERPRISES, INC., *et al.*,
Defendants.

MEMORANDUM DECISION

This cause is before this Court on the motion for summary judgment filed by defendants pursuant to Rule 56 of the Ohio Rules of Civil Procedure. Defendants move for summary judgment in their favor and against plaintiffs on the personal injury claim of Santos Torres and the loss of consortium and infliction of emotional distress claims of his wife, Esther Torres. The Court has before it the pleadings of the parties, defendants' memorandum in support of its motion (to which is attached the affidavit of Robert Richard, President of J. F. Enterprise, Inc.), and plaintiff's motion to deny defendants' motion with supporting memorandum (to which are attached the affidavits of Santos and Esther Torres).

FACTS

On September 6, 1985, plaintiff Santos Torres, drove his van to the gas station owned by defendant J. F. Enterprises, Inc. As he exited the van to operate

defendants' self-service gas pumps, Mr. Torres stepped into what he describes as an elongated hole in the surface of the pump area and tripped injuring his right foot and knee. Employees of the station, defendants Greg Shetzer and Kathy Rose, situated approximately forty feet away did not observe Mr. Torres stepping in the hole but Mrs. Torres reported the incident to [26] defendants Shetzer and Rose. Mr. Torres asserts the injury occurred at an island on the north side of the premises.

On September 9, an employee of the station showed Mr. Richard a depression in the pavement where the pump island met the surrounding paved surface. The employee believed that this was where Mr. Torres had tripped. Mr. Richard observed that the depression was approximately two feet square and less than one inch deep.

In August of 1985, there existed another defect in the pavement around the northern pumps island. This consisted of crack approximately fifteen feet long and of unknown depth where the pavement had settled. In August the contractor agreed to repair this crack and a repavement of the pump area was finished sometime in September of 1985. Mr. Torres is unable to give a size description of the hole where he was injured and has returned to the site of the injury only to find that the entire area is smooth, without depressions of any kind. The defendant, Gregory Shetzer examined the crack and found there to be an elevation difference of about 1 1/2 inches at the crack.

DISCUSSION

Defendants have moved for summary judgment in their favor as a matter of law relying upon the so-called "two-inch doctrine" set forth in *Kimball v. Cincinnati* (1953), 160 Ohio St. 370, and its progeny. According to this doctrine, a hole or unevenness in the surface of an area traversed by pedestrians which is less than two inches in depth, may be found, in light of the attending circumstances, to be a "minor" or "trivial" imperfection in the surface such that the owner thereof is not liable to those injured by the condition as a matter of law. *See Kimball v. Cincinnati, supra; Gallagher v. Toledo* (1959), 168 Ohio St. 508; *Buckley v. Portsmouth* (1959), 168 Ohio St. 513; *Amos v. Cleveland Heights* (1959), 169 Ohio St. 367; *Kindle v. Akron* (1959), 169 Ohio St. 373; *Helms v. American Legion, Inc.* (1966), 5 Ohio St. 2d 60; *Cash v. Cincinnati* (1981), 66 Ohio St. 2d 319. Although, as admitted by defendants in their motion, there does not appear to be any reported Ohio decisions dealing with imperfections in filling station driveways or other [27] areas traversed by both pedestrians and motorists, the basic rationale of the *Kimball* decision seems applicable to the case at bar. Owners of premises commonly traveled by members of the public are not insurers against injury caused by minor imperfections in the surface area which are commonly encountered and to be expected by the traveler. *Helms, supra*, syllabus. Whether Mr. Torres was a "pedestrian" or a "motorist" when he was injured as he stepped from a motor vehicle is not determinative in applying the two-inch doctrine to the circumstances of this case.

Before the Court may render summary judgment pursuant to Rule 56 of the Ohio Rules of Civil Procedure, the defendants must show that there is no genuine issue

as to any material fact and that the moving party is entitled to judgment as a matter of law. When a defendant's motion for summary judgment alleges that the facts will not support a legal basis for liability even if proven, a summary judgment may be considered. A summary judgment is similar to a dismissal for failure to state a claim for which relief can be granted. *Kwait v. John David Management Co.* (1974), 42 Ohio App. 2d 63, 329 N.E. 2d 702, paragraph three of the syllabus. Plaintiffs, in their opposing motion, assert that genuine fact issues exist concerning the size and location of the hole where Mr. Torres was injured. However, plaintiffs have plainly demonstrated, first in their complaint and again in their supporting affidavits, that they will be unable to adduce evidence addressing these issues at trial because plaintiffs either failed to observe or obtain measurement of the hole's dimensions. At trial the plaintiffs will not be able to more than reiterate the unsupported allegations of their complaint in response to Mr. Richard's or Mr. Shetzer's testimony regarding the depth of the hole. Although unsupported allegations in the pleadings is not a sufficient ground for granting summary judgment, the basic role of summary judgment is "to move beyond allegations in pleadings, and to analyze the evidence so as to ascertain whether an actual need for a trial exists." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64, 66. Applying this principle to the case *sub judice,* defendants' motion for summary judgment must be granted if it is apparent that plaintiffs will not be able to [28] establish that the hole was of sufficient dimension to create a breach of the defendants duty to protect members of the public from unreasonable risks. Construing the evidence before the Court most strongly in the plaintiffs' favor, it appears inevitable that plaintiffs will not be able to establish a

prima facie case of negligence in the absence of any proof whatsoever concerning the size of the hole where plaintiff was injured. The evidentiary presumption of res ipsa loquitur is unavailable in the plaintiffs case in the absence of evidence tending to show that Mr. Torres' injuries would ordinarily have occurred only by a breach of defendants duty of care. *Morgan v. Childrens' Hosp.* (1985), 18 Ohio St. 3d 185. For this reason, defendants' motion for summary judgment in their favor must be granted on Mr. Torres' negligence claim. Also, because Mrs. Torres' claims are derivative to Mr. Torres' negligence cause of action, summary judgment must be granted in favor of defendants on the loss of consortium and infliction of emotional distress claims as well.

/s/ GALE WILLIAMSON
Judge

MAGISTRATE'S REPORT AND RECOMMENDATION IN CHETISTER V. DOUGLAS, ET AL.

(Filed September 19, 1985 U.S. Dist. Ct., E.D. Ohio)

Case No. C 84-8077

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

LAVAUN CHETISTER,
Plaintiff,

vs.

ANDY DOUGLAS, *et al.*,
Defendants.

MAGISTRATE'S REPORT AND RECOMMENDATION

This case has been referred to the undersigned for a Magistrate's Report and Recommendation. Pending is defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted, pursuant to rules 12(b)(1) and 12(b)(6), Fed.R.Civ.P. Plaintiff has filed his opposition to defendants' motion and defendants have been granted leave to submit, and have submitted, supplemental authority. The complaint alleges violation of plaintiff's civil rights under 42 U.S.C. §1983, with jurisdiction predicated on 28 U.S.C. §§1343, 2201, 2203. For the following reasons, I find that defendants' motion to dismiss is well taken.

Plaintiff filed suit in Lucas County Common Pleas Court against James G. Chetister, alleging fraud in a real estate transaction. The court entered a directed verdict in favor of James Chetister on September 16, 1983. Plaintiff filed a timely appeal with the Sixth District Court of Appeals for Ohio and that court unanimously upheld the decision of the [2] trial court. *See,* Plaintiff's Exhibit "F." Plaintiff then filed a notice of appeal with the Supreme Court of Ohio, which did not raise any constitutional issues, and was thus treated as a motion to certify. This motion was denied. Plaintiff subsequently filed a motion for rehearing additionally alleging a constitutional deprivation of her right to "equal treatment under the law as guaranteed by the Fourteenth Amendment." *See* Plaintiff's Exhibit "M." The claimed constitutional deprivation was allegedly due to the Ohio Supreme Court's failure to take jurisdiction of her case. This motion for rehearing was also denied.

In her complaint to this Court, plaintiff seeks a declaratory judgment against the ten Ohio Justices and Judges who considered her case, declaring that O.R.C. §§2505.03, 2505.29, 2503.40 and App. R. 12(A), as applied by the defendants to the plaintiff's case are "null and void as violative of the Constitution of the United States." *See* Complaint at 14. Plaintiff asserts that defendant Court of Appeals deprived her of her First Amendment right to petition the government for redress of grievances and deprived plaintiff of her "liberty" right to petition the government without due process of law, in violation of the Fourteenth Amendment. These alleged deprivations stem from plaintiff's contention that the Court of Appeals decided her appeal on an issue not briefed, in violation of O.R.C. §2505.03 and App. R. 12(A). Plaintiff further alleges that defendant Supreme Court of Ohio, [3] in applying O.R.C. §2505.29 and by not granting plaintiff leave to appeal, deprived plaintiff of

the same constitutional rights. Finally, plaintiff contends that defendant Supreme Court of Ohio, by not using the powers granted by O.R.C. §2503.40 to correct the Court of Appeals' judgment, violated plaintiff's right to due process by not "apprehending or correcting the violators of plaintiff's constitutional rights under the First and Fourteenth Amendments." *See* Complaint at 12-14.

In their motion to dismiss, defendants advance two arguments. First, that pursuant to rule 12(b)(1), Fed.R.Civ.P., this Court lacks jurisdiction over the subject matter. Second, that pursuant to rule 12(b)(6), Fed.R.Civ.P., the complaint fails to state a claim upon which relief can be granted. For the reasons that follow, it is only necessary to consider defendants' first argument.

At the outset, in any motion to dismiss under rule 12(b), this Court must take as true all well-pleaded factual allegations of the complaint, *Amerbach v. City of Cleveland*, 598 F.2d 1033, 1034-35 (6th Cir. 1979), *Sexton v. Barry*, 233 F.2d 220 (6th Cir. 1956), and view them in the light most favorable to the plaintiff. *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976).

While the federal district courts, by virtue of 28 U.S.C. §1343, have jurisdiction over cases brought under 42 U.S.C. §1983, the plaintiff may not use the Civil Rights Act as a means of compelling the district courts to take [4] jurisdiction. The Civil Rights Act was not designed to be used as a substitute for the right of appeal, or as a means to collaterally attack a final judgment of the highest court of a state . . ." *Coogan v. Cincinnati Bar Association*, 431 F.2d 1209, 1211 (6th Cir. 1970). Plaintiff, by arguing that defendants unconstitutionally applied the Ohio statutes in question, is in reality seeking review of a state court by a federal district court. *District of Columbia Court of Appeals v.*

Feldman, 460 U.S. 462 (1983). The Supreme Court held in *Feldman* that United States district courts "do not have jurisdiction . . . over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *Id.* at 486. If a competent state court having jurisdiction has rendered judgment, and the case has been appealed through the state court system, then the only avenue for the correction of constitutional errors is to the appellate jurisdiction of the Supreme Court. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

Plaintiff argues that no state court judgments are involved in this action. She states that she is seeking review of a "lack of procedural due process surrounding the hearing conducted by the defendant Court of Appeals before it came to its decision." *See* Memorandum in Opposition to Defendant's Motion to Dismiss at 4. Plaintiff also contends that there is [5] no Ohio Supreme Court decision to review since her case was never heard by that court.

Despite plaintiff's attempts, these arguments are without merit and the cases cited by the plaintiff are inapposite to her cause. First, the alleged unconstitutional applications of the state statutes are "inextricably intertwined" with the manner in which plaintiff's case was resolved by the Ohio courts. As such, this Court would be called upon to do that which it is not empowered to do, review the propriety of the state court decisions. *Feldman*, 460 U.S. at 483-84, n.15. Second, the cases of *Carey v. Piphus*, 435 U.S. 247 (1978) and *Fuentes v. Shevin*, 407 U.S. 67 (1972), cited by the plaintiff for support, did not involve judicial proceedings. In *Carey*, students were expelled without procedural due process, without a hearing, and in *Fuentes*, the Supreme Court held that the government has the power to use

summary procedures to collect revenue without initially resorting to a judicial proceeding. Neither case has any bearing on plaintiff's situation. Obviously, plaintiff is dissatisfied with the state courts' treatment of her case and feels she was wronged. However, "lower federal courts possess no power whatever to sit in direct review of state court decisions." *Atlantic Coast Line R. Co. v. Locomotive Engineers,* 398 U.S. 281, 296 (1970). Plaintiff must seek review in the United States Supreme Court, *Johns v. The Supreme Court of* [6] *Ohio*, Case No. 83-3358 (6th Cir. 1985), and she has filed notice of her intention to do so.

Defendants' second argument for dismissal pursuant to rule 12(b)(1), Fed.R.Civ.P., is that the complaint is barred by the Eleventh Amendment doctrine of sovereign immunity. The Eleventh Amendment states that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI. The Eleventh Amendment also bars federal jurisdiction over claims by a citizen against his state. *Hans v. Louisiana,* 134 U.S. 1 (1890). What plaintiff seeks to do is to force the Ohio courts to resolve alleged inconsistencies in the application of the Ohio statutes in question. However, "[c]ase law is legion that the Eleventh Amendment to the United States Constitution directly prohibits federal courts from ordering state officials to conform their conduct to state law." *Johns v. Supreme Court of Ohio,* Case No. 83-3358 (6th Cir. 1985), citing *Pennhurst State School & Hospital v. Halderman,* _____ U.S. _____, 104 S.Ct. 900 (1984). Plaintiff attempts to argue that her case is not against the State of Ohio, but against the Ohio Justices and

Judges who allegedly unconstitutionally applied the Ohio statutes to her case. In reality, plaintiff is seeking to abrogate an adverse ruling in her case by the Ohio Supreme Court. "The Eleventh Amendment bars a suit against state officials when 'the state [7] is the real, substantial party in interest.' " *Pennhurst State School & Hospital v. Halderman*, _____ U.S. _____, 104 S.Ct. 900, 908 (1984), quoting *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). If relief sought against an official actually affects the state, then the state is the real party in interest, and the suit is against the state. *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963).

> The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting or cause it to act.

Pennhurst, 104 S.Ct. at 908, n.11, citing *Dugan v. Rank*, 372 U.S. 609, 620 (1923).

Clearly, by attempting to gain declaratory relief against the Ohio Justices and Judges, plaintiff's case is brought within the scope of the general rule reasserted in *Pennhurst*. Such a judgment would adversely affect the administration of justice in Ohio by abrogating statutory interpretations already completed by the Ohio judicial system. A judgment declaring Ohio App. R. 12(A) unconstitutional would compel the Ohio courts to modify App. R. 12(A) and apply it to plaintiff's case in a manner that is contrary to the decision already promulgated by the Ohio courts. This the plaintiff may not do. *Johns v. Supreme Court of Ohio*, Case No. 83-3358 (6th Cir. 1985).

[8] Furthermore, the Eleventh Amendment bars the federal courts from granting retroactive relief. *Edelman v. Jordan*, 415 U.S. 651 (1974). In this instance a judgment such as the plaintiff seeks would not help her cause, but only prevent Ohio courts from applying the statutes in a similar matter in future cases.

Plaintiff argues that by enacting legislation under §5 of the Fourteenth Amendment, Congress has abrogated the states' Eleventh Amendment immunity. However, the Supreme Court has explicitly held that §1983 did not override state official's immunity for acts taken in their official capacity. *Quern v. Jordan*, 440 U.S. 332 (1979). Similarly, Ohio's waiver of immunity in its own courts does not infer such a waiver of Eleventh Amendment immunity in federal courts. *Edelman v. Jordan*, 415 U.S. 651, 677, n.19 (1974); *Johns v. Supreme Court of Ohio*, Case No. 83-3358 (6th Cir. 1985). Indeed, "there has been no constitutional statutory waiver of Ohio's Eleventh Amendment rights." *State of Ohio v. Madeline Marie Nursing Homes*, 694 F.2d 449, 460 (6th Cir. 1982).

For all of the above reasons, it is, therefore,

RECOMMENDED that defendants' motion to dismiss be granted.

/s/ JAMES G. CARR
United States Magistrate